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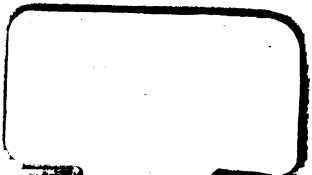

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REPORTS

—OF CASES DECIDED IN—

CHANCERY CHAMBERS

—AND IN THE—

MASTER'S OFFICE.

BY

C. W. COOPER,

REPORTER.

VOLUME IV.

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REPORTS OF CASES

DECIDED IN

CHANCERY CHAMBERS,

AND IN

THE MASTER'S OFFICE,

AND OTHER DECISIONS AFFECTING POINTS OF PRACTICE.

THOMPSON v. FREEMAN.

Chambers or Court Application.

A motion which is strictly and properly a Court motion, will not be taken in Chambers by the consent of parties.

A motion so made in Chambers was refused, but without costs.

[January 9, 1872.]

Statement. The plaintiff, who was also the receiver applied on petition for an order vesting all the bonds, mortgages, and other securities for money and the lands of the estate in him as receiver until such time as the division provided for by the decree on further directions was made, and the new trustees appointed in pursuance of that decree, or that the present trustees might be "ordered to convey and assign all their estate and interest in the property to the petitioner as receiver."

The parties beneficially interested in the estate in question were the plaintiff who had by far the largest interest, and Mr. and Mrs. *Rodgers* and their infant children. The decree on further directions made in 1869 directed a division of the estate, the conveyance to the plaintiff of his share, and to three trustees to be appointed by the Master of the shares of the said parties. To the order now asked the present trustees and Mr. and Mrs. *Rodgers* consented. The guardian of the infants

1872.

Thompson v. Freeman.

neither opposed it nor consented, he simply submitted their interests to the Court. The reasons assigned for the application being made were that as lands of the estate have from time to time to be conveyed to purchasers, or the mortgages of debtors had to be released, great expense and delay was occasioned by the necessity for sending the deeds and releases to the trustees residing at different places for execution, and that recently one of the trustees had refused to execute any more deeds or releases.

Mr. *Foster* for the plaintiff.

Mr. *Cassells*, for Mr. *Rodgers*; Mr. *McKeown*, for the infant defendants.

MR. TAYLOR, REFEREE IN CHAMBERS.—Besides other difficulties in the way of granting such an order as is asked I do not see how I can make it in Chambers. The order is not one to enable the receiver to do something within the ordinary scope of a receiver's duty, but I am, in fact, asked to invest him with an entirely new character, and substitute him as trustee in the room of the trustees appointed by the testator. To grant the order, I must first decide whether the time fixed by the decree on further directions for appointing new trustees should be anticipated, and whether instead of trustees being appointed for the shares of the infants only after a division, a trustee of the whole estate should be appointed now; and also that the plaintiff is a fit and proper person to be appointed such trustee. The application would therefore seem to be a proper one for Court. In *Morphy* v. *Feehan* (*a*) on the 15th of June, 1868, an order similar to that now asked was made by the present Chancellor, but in Court not in Chambers. That the parties here consent to the

Judgment.

(*a*) O. B. 20 p. 122.

application being made in Chambers does not give jurisdiction to make there an order which should properly be made in Court: *Craig* v. *Craig* (*a*). As, however, the parties have so consented, I do not think I should refuse the application, but should adjourn the petition to Court.

1872.

Thompson v. Freeman.

LAPP V. LAPP.

Amending decree—Referee's jurisdiction—Leave to rehear.

The Referee's jurisdiction with regard to amending decrees considered *Lapp* v. *Lapp*, *ante* page 234, affirmed. Leave to rehear refused, after considerable delay on part of party seeking to rehear, and where the grounds for rehearing was an alleged error in the decree which was not an obvious error and caused no miscarriage of justice.

[January 22, 1872.]

A bill had been filed to settle the construction of a will and to have theplaintiff's rights thereunder declared. Judgment in the suit was given as reported 16 Grant 169. The decree was drawn up and entered, and carried into the Master's office when the defendant discovered that the decree was not, as he contended, in accordance with the judgment, he thereupon filed his petition in Chambers which was dismissed as reported 3 Cham. Rep. 234. The defendant now appealed from the order then made.

Statement.

Mr. *T. Moss*, for the defendant *Henry Lapp*, who appealed, argued that upon the second branch of the application asking leave to rehear, the affidavits shewing variance between the judgment and the decree could be read, and the affidavit being read it was contended that it established that the application to rehear would have been made in sufficient time, had the defendant known the construction which was put upon

(*a*) 1 Ch. R. 42.

1872.

Lapp v. Lapp.

the seventh paragraph of the decree, and he urged that as to the second part of the application the Referee should have granted the leave to rehear.

Mr. *S. H. Blake*, contra. The second branch of the application was not within the jurisdiction of the Referee. It did not come regularly and properly before him, and he could not adjourn the matter to be heard before a judge as prayed. The Referee was right on both points, and he could not have held otherwise without exceeding his jurisdiction.

Bank of Upper Canada v. *Wallace* (*a*), *Davidson* v. *Boomer* (*b*), were referred to.

SPRAGGE, C.—I hold the Referee to have been right on both points, and think he could not have come to any other conclusion. He was right I consider in not giving further time to rehear, for virtually the present application is an application for further time to rehear. The question raised and argued upon the construction of the will is only material in relation to the exercise of discretion in granting or refusing further time; for instance, it might be manifest upon reading the will and my judgment that I had made a mistake, and that there would be a miscarriage of justice unless that mistake was corrected. It was treated in argument as if upon the settling of the minutes it was clear that a mistake had been committed. What defendant really seeks is to exempt his estate in the homestead from the charge of the legacy to the widow. In the three legacies to the daughters the charge is general. There is no pretence that the homestead is exempt from charge as to them, but no reason has been suggested for a difference. As to the words relied on "to be made out of my other property the homestead" is not the

Judgment.

(*a*) 2 Cham. R. 170. (*b*) 2 Cham. R. 371.

last preceding antecedent or last preceding property dealt with, or mentioned, but a Cobourg town lot, the subject of a distinct devise. 1872. Lapp v. Lapp.

It may be questioned if it was ever contended on behalf of the defendant that the homestead was exempt In settling the minutes I perceive that I have noted "the word 'residuary' should be struck out" I find no observation upon it by counsel for the plaintiff; the residuary real estate would be the mill property and perhaps some other properties, and the remainder the homestead. If the word 'residuary' were struck out the charge in effect would be general. In the notice to vary minutes there is no objection pointing to the present alleged error. However I am not now giving judgment on the construction of the will, but at all events there is no such plain obvious error in the construction as is contended for. Then as to the question of delay, it was known in December, 1870, that the plaintiffs claimed that the homestead was not exempt, defendant's own affidavit carries his knowledge back to three or four weeks before March, 1871. The Referee's judgment was given on March 21st, 1871, and there has been a rehearing term since decree, and there has been a length of time allowed to elapse since the claim was known and proceedings had on the reference. If there had been a palpable error, and serious miscarriage of justice would take place in consequence I might be inclined to give further time to rehear, but such is not the case, and the question as to the correctness of the construction is now in fact raised for the first time. I must confirm the Referee's order, and refuse leave to rehear with costs. Judgment

1872.

RE HOWLAND.

Suppression of material facts—Ex parte order.

An application for leave to pay into Court $400, as security for costs of an appeal from a certificate of title under the quieting titles act having been granted by the Referee *ex parte*, and it not having been brought to his notice that the appeal was as to two separate parcels of land, one claimed by a husband and wife, and the other by the husband alone; it was held that the order was bad, as these facts should have been made known to the Referee, and the order under such circumstances made upon notice.

[February, 1872.]

Statement.

The contestants, *Perry* and wife, had obtained an order *ex parte* allowing them to pay $400 into Court instead of giving the usual security. They were seeking to appeal as to two different parcels of land included in the certificate. Separate appeals had been brought before Vice Chancellor *Strong*, but these facts were not brought to the notice of the Referee on the application for the *ex parte* order. An application had been made upon notice before the Referee to set this order aside, which application the Referee directed to be heard before a Judge. The matter now came before *Strong*, V. C.

Mr. *Fitzgerald*, for the application.

Mr. *Hamilton*, contra.

Mr. *Fitzgerald*, contended, 1. That six months only were allowed for appealing in such a case if any appeal at all would lie, and referred to *Brigham* v. *Smith* (*a*)

2. That no appeal would lie after a certificate for title had gone. When once granted it was final. To hold otherwise would lessen the value of certificates and unsettle titles.

(*a*) 3 Cham. R. 313.

3. That there should have been two appeals, and separate bonds for payment in each. That the fact that there were two separate appeals was not brought to the notice of the Referee when the *ex parte* order was applied for.

4. That such order if granted at all should only have been granted on notice.

Mr. *Hamilton*. It must be assumed that the Referee is right until the contrary shewn. He can always inform himself of the facts on the records of the Court, and it is to be presumed he did so (*a*). There was not any intentional suppression, or indeed any suppression of a material fact, the fact being that both contestants are interested in the two parcels of land in question, one jointly as man and wife, one the husband alone. Until the petition of appeal is filed it cannot be known whether the appellants may not properly appeal jointly, and the objection is therefore premature, such orders are frequently made *ex parte*, and the present order was not bad on that ground.

Judgment.

STRONG, V. C.—This is a motion originally made before the Referee, and by him adjourned under Order 562, to be heard before a Judge in Chambers.

The application is to discharge an order made by the Referee permitting *Daniel Perry* and his wife, who were contestants, making separate claims, on a proceeding under the Quieting Titles Act to pay into Court $400, instead of providing the bond required by the Statute, to answer the costs of an appeal to the Court of Error and Appeal. This order was made *ex parte*, and it was not disclosed to the Referee, as the fact was, that Mr. and Mrs. *Perry* had filed separate claims to distinct parcels of the land in question. The order is

(*a*) Ostrander v. Ostrander, 3 Cham. R. 50.

1872. objected to as not having been made on notice, and also on the ground of the concealment which is shewn by the Referee's certificate.

Re Howland.

I am of opinion that the order must be discharged on both grounds. In the first place although, as a general rule, it may be more beneficial to a respondent that the money should be deposited than that a bond should be given, yet in the present case, when the respondent contends that security should be given as in two appeals shewing that it is not impossible that there may be objections to urge to such an order, I cannot say therefore that the respondent was not entitled to have notice of the application.

Then the applicant ought to have fully disclosed to the Referee the fact that there were two distinct contestations in respect of different parcels, and that there was not merely one claim by husband and wife as the Referee was led to suppose. I can give no weight to the circumstance that the Referee had had recently before him an application in this same matter which disclosed the true state of the proceedings, and called his attention to the double claim of the appellants. It would be impossible to conclude on that account that this order was made with a full view of all the facts.

Judgment.

For these reasons, without touching the other grounds of objection taken by the notice of motion, the order must be discharged with costs.

1872.

STOVEL v. COLES.

Production of documents.

A party is not obliged to produce deeds or documents which relate to his own title and do not tend to establish the case of the party calling for the production.

[February 8, 1872.]

Mr. *Bain*, on part of plaintiff, moved for an order that defendant file a better affidavit on production. The affidavit filed claimed privilege from production of certain deeds alleged to relate exclusively to the defendant's title. Mr. *Bain* contended that he was entitled to see these deeds as they related to the title of the plaintiff as well as to that of the defendant. Up to a certain point they claimed under the same title. *Maden* v. *Veevers*. (*a*)

Statement.

Mr. *Arnoldi*, contra. The documents in question are all subsequent to the time from which the plaintiff claims title. In the case cited, *Maden* v. *Veevers*, the tenancy in common of the parties claiming adversely was admitted. Here the answer denies the right of plaintiff *in toto*, and defendant cannot be called on to produce deeds relating to a title he denies, so to hold would be to prejudge the case. *Green* v. *Amey*, (*b*) *Nichol* v. *Elliott*, (*c*) *Felkin* v. *Lord Herbert*. (*d*)

Mr. *Bain*, in reply.—The fact of the defendant disputing our title is a reason why we should see the deeds. *Green* v. *Amey* does not apply, there, the suit was for specific performance, here it is for partition, the deeds here are part of the plaintiff's title. *Nichol* v. *Elliott* is also inapplicable.

(*a*) 7 Beav. 489. (*b*) 2 Cham. R. 138.
(*c*) 3 Grant, 536. (*d*) 9 W. R. 756.

1872.

Stovel v. Coles.

THE REFEREE, on the authority of *Maden* v. *Veevers*, granted the application. The defendant appealed, and the matter came before *Strong*, V.C. The same counsel appearing for the respective parties, and taking the same grounds as on the argument before the Referee.

STRONG, V. C.—I am of opinion that the affidavit filed by the defendant is quite sufficient to shew that the deeds and documents which are sought to be protected could in no way assist in making out the plaintiff's title.

The defendant therefore brings himself within the third proportion laid down by Sir *James Wigram*, and is entitled to have these documents protected as not tending to make out the plaintiff's case. Two of the cases cited, *Green* v. *Amey* (*a*) and *Hunt* v. *Elmes* (*b*), may be selected from a great number, as instances of the application of this well established rule, which was indeed necessarily implied in Lord *Cottenham's* decision in the celebrated case of *Hardman* v. *Ellames* (*c*), in which it was determined that the defendant had waived his right to protection by stating an instrument of title in his answer craving leave to refer to it in the usual form. See also *Kerr* on Discovery, pp. 171 *et seq.* I do not understand the case of *Maden* v. *Veevers* (*d*) which is relied on in the judgment of the Referee to apply here. In the present case the question for trial is the plaintiff's title which is most emphatically denied by the defendant. Apart from all authority it would be most unfair and unreasonable to compel the defendant to discover his title to a person who, for aught which appears to the contrary, may be a mere stranger. In *Maden* v. *Veevers*, the plaintiff in a suit for partition alleged himself to be tenant in common with the defendant, and this the defendant admitted. It was therefore

Judgment.

(*a*) 2 Ch. Cham. 138.
(*b*) 5 Jur. N. S. 645.
(*c*) 2 My. & K. 732.
(*d*) 7 Beav. 489.

determined that "as between these two persons admitting themselves to be tenants in common with each other, the Court would order the production of the title deeds of the estate in the hands of either of them for the inspection of each other." *Kerr* on Discy, p. 31. There the only question was as to the division of the whole estate and the proper parties to that division, and for these purposes it was manifestly material to the interest of both plaintiff and defendant that they should see each other's title deeds, as well those anterior to the accrual of their respective titles, as those by means of which they had dealt with their shares after they had acquired them. 1872. Stovel v. Coles.

The Referee's order must be discharged with costs, and the motion for further production refused with costs. Judgment.

RE CROSS.

Solicitor and agent—Lien.

The agent of a solicitor has a lien on the papers, or on a fund recovered against his principal, and to the same extent against the principal's client, and such client is justified in paying the agent so as to discharge such lien and obtain his papers.

Where the client had paid the Toronto agent who retained the bulk of the funds recovered on account of his agency bill, and offered the principal the balance who refused it and issued execution against the client for the whole amount; such execution was stayed with costs.

The agency charges in the following case were wholly for work in the suit in which the client was a party, *sed query*, would the solicitor's lien attach for the amount of his agency bill generally.

[February, 1872.]

A Toronto firm of practitioners had been agents for *Cross*, a solicitor in the country, in a suit of *Wilson* v.

1872. *Robertson.* They subsequently ceased to be such agents, and were retained by the plaintiff in the same suit. Costs were taxed against the plaintiff amounting to $373 which he paid to the Toronto firm, who retained thereout their agency bill against *Cross*, remitting to him their cheque for the balance $56. This he refused to accept, and returned to them; and issued execution against the plaintiff for the whole amount taxed. The papers in the cause were still in the hands of the Toronto firm, and consequently not given up to the plaintiff. The interest of *Cross* in the costs had afterwards been assigned to Mr. *Bain*, the present Toronto agent of *Cross*.

Re Cross.

Statement.

Mr. *S. H. Blake* now moved before the Referee that the execution should be stayed, or ordered to be withdrawn, arguing that the issuing of such execution under the circumstances was a prostitution of the process of the Court. Mr. *Bain*, the assignee, took the interest subject to all the equities against *Cross*, and could not stand in any better position than *Cross* himself did. The papers had been demanded but not given up, and in seeking payment now from the plaintiff they were bound to go with the papers in their hand. There was no need for issuing execution. The plaintiff had always been ready and willing to test the question on the merits, and he was a man of undoubted responsibility and if shewn to be liable, quite willing and able to pay. It was a question of lien depending altogether upon the construction of the law; and such an extreme step was improper and uncalled for. Whether the money due the agent was wholly for costs in *Wilson* v. *Robertson* did not affect the question, the agent had a lien for work done generally, and the client was justified in coming and discharging such lien. (*a*)

(*a*) Stokes Lien of Solicitor, 173, 180; Bray v. Hine, 6 Price 203.

Mr. *Bain* contra. The position taken by Mr. *Wilson* heretofore has been, that he had already paid the money, not that he had not received the papers. Mr. *Wilson* had employed *Cross's* agent as his solicitors, and that terminated their agency for *Cross*. The two positions were adverse. *Wilson* paid the money to his now solicitor, that was not payment to *Cross*. The fact that Mr. *Wilson* is wealthy, is no ground for staying the execution. The other side set up that the payment was a good payment to *Cross* which he disputed, and the execution was issued to raise that question: it was the only mode in which he could bring the matter to an issue: *Storey* on Agency, Lien, sec. 360, 361. The money in question did not come to the hands of the Toronto firm whilst agents. The money should be received whilst agency exists to give a lien. If authority to receive it is disputed, no lien attaches. No authority existed here either express or implied. 1872. Re Cross.

Mr. *Blake*, in reply. *Bray* v. *Hine* is a clear authority for the position that a payment may be made to an agent, and a lien created after agency had ceased. In that case the principal was a bankrupt, and had ceased to practice. *Ex parte Steele* (*a*) was also referred to.

MR. TAYLOR, REFEREE IN CHAMBERS.—I do not see how I can distinguish this case from *Bray* v. *Hine* (*b*) cited by Mr. *Blake*. There the town agents of a country solicitor having received from him papers of a client for the purposes of the client's business, and upon which they had a lien the solicitor became bankrupt, the client, to obtain his papers, paid the town agents the amount due them, though the assignees of his solicitor had commenced an action against him for the recovery of the costs due the solicitor, and the Court restrained the assignees from proceeding with the action. Here the Judgment.

(*a*) 16 Ves. 161. (*b*) 6 Price 203.

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Re Cross.

town agents, having papers of the client, the solicitor proceeded to tax his costs against the client, and the client then paid the amount reported due to the town agents, who retained the amount for which they claimed a lien, and remitted the balance to the solicitor who refused to receive it. That balance returned by the solicitor the town agents now hold subject to his order.

It was contended here that the agency of the town solicitors having been put an end to before the money was paid to them, the payment was not a good one; but in *Bray* v. *Hine* the agency was also at an end, for the solicitor having become a bankrupt could not practice, and could have no agents.

Besides, it has been decided that the town agent having a lien has a right to intervene, and have the money due to the solicitor paid to him to the extent of his lien (*a*).

Judgment.

That the claim here had been assigned by the solicitor before payment makes no difference, for no notice of the assignment was given either to the client or the town agent until after the money was paid.

A further question was raised as to the solicitor's right to the payment of the money before handing over the papers of the client, it being contended for the client that he had a right to insist upon the handing over of his papers being contemporaneous with the payment, while on the other hand the solicitor contended that until the money was actually paid the client could not call upon him even to look over the papers or take any step towards handing them over. I think the contention of the client the correct one. I find no express decision upon the point, but in *Re Bevan* v.

(*a*) Ward v. Hepple, 15 Ves. 297; Ex parte Steele, 16 Ves. 161.

Whittey (*a*) it was said by Lord *Romilly* that if the client pays the money into Court or if when proceeding upon the taxation it appears that there is a balance against the solicitor, or nothing due him, the client may apply for the delivery of his papers without waiting until the close of the taxation. 1872. Re Cross.

An analogy is furnished by mortgage cases. Decrees for foreclosure or sale contain a direction that upon the defendant (the mortgagor) paying the amount due at a certain time and place the plaintiff (the mortgagee) do assign and convey, &c., and "deliver up all deeds and writings in his custody or power relating thereto upon oath to the defendant, &c" (*b*). The order here provides "that upon payment by the petitioner (the client) to the solicitor of what may be certified due to him as aforesaid, or in case nothing appears due, &c., the said solicitor do deliver to the petitioner upon oath all deeds papers and writings in his custody or power belonging to the petitioner and relating to the said business." The terms of the mortgage decree and the order for taxation are the same. Now the Court goes as far as it can go in protecting mortgagees from producing their deeds until the amount due them is paid; yet where a mortgagor gave notice of his intention to pay off a mortgage, but did not pay it because the mortgagee was not prepared to hand over the deeds, the Court held he was justified in refusing, and gave him the costs of a redemption suit which he afterwards instituted (*c*). The practice as to paying the money and receiving the deeds had to be considered in *Weeks* v. *Stourton* (*d*) by Vice Chancellor *Kindersley* who said, "no doubt the party who pays is not under an obligation to do so without simultaneously receiving the documents whatever they are; although perhaps the placing of the Judgment.

(*a*) 33 Beav. 439. (*b*) See Con. Genl. Orders, 441, 450.
(*c*) Lord Middleton v. Elliott, 15 Sim. 531.
(*d*) 11 Jur. N. S. 279.

1872. money in the hands of the mortgagee should have a momentary precedence."

Re Cross.

Here the papers were demanded from the solicitor on the 5th of December, he knowing that the money was in the hands of the town agents ready to be paid over, but up to the present time he has taken no steps to procure the papers for delivery to his client. The papers having been demanded and not being then in his possession, and the client being aware of this, I think it was the duty of the solicitor to have procured the papers and given the client notice that he was prepared to hand them over on receiving payment; and that until he did this he was not justified in issuing an execution.

Besides, he was, before he issued the execution, aware that the money had been paid by the client to the solicitors in town, and that there was between himself and these solicitors a *bona fide* question in dispute as to their lien. This question they were quite willing to submit to the Court for decision, though the near approach of the Christmas vacation prevented its being heard for a short time. Under these circumstances the solicitor, not being prepared to hand over the papers, knowing that the money was in the hands of the solicitor in Toronto, and that there was this disputed question between them, his issuing an execution was improper; and I order it to be set aside with costs.

Judgment.

From this decision Mr. *Bain* appealed, and the appeal came on to be heard before Vice Chancellor *Strong*, the 3rd February, 1872.

Mr. *Bain* contending that the other side were bound to establish that the payment to the Toronto agent was

a good payment to *Cross* or his assignee. The present petition or application was not to have the payment allowed as a good payment, but to set aside the execution. Taking their own ground, they were not entitled to any such relief: they were bound to shew an existing agency at the time of payment, and that they had a continuing lien on papers on their hands. 1872. Re Cross.

THE VICE CHANCELLOR.—If *Bray* v. *Hine* is correctly cited, it would appear to decide that point.

Mr. *Bain.*—The client was only justified in paying the agent where the agent had papers, but here the papers could not be in the hands of the Toronto firm as agents, for they had become solicitors for *Wilson* and such a position was inconsistent with an actual or implied agency.

THE VICE CHANCELLOR.—Do you contend that the new relationship of solicitor destroys the lien which they would otherwise have had? Judgment.

Mr. *Bain.*—They have by their own act discharged themselves from being agents, and cannot claim the rights attached to the position of agent, they could not hold the papers as against *Wilson* as client, or against themselves as solicitors (*a*). However he was not called on to meet a case of lien, he had only to meet a case for setting aside the execution. Their lien, if existing, would only be for agency charges in *Wilson* v. *Robertson*, and there would be something due to *Cross*. Whatever the amount, it was sufficient to sustain the execution.

Mr. *Blake.*—No; as against *Cross* our lien was general.

(*a*) Danl. Pr. 1676.

1872.

Re Cross.

THE VICE CHANCELLOR.—My view is, that the payment was good to the extent of the costs in *Wilson* v. *Robertson*. At any rate, it is asserted in Mr. *Fletcher's* affidavit that the whole amount was due in that suit; if so, the payment is good in whole.

Mr. *Bain* argued that to the extent of the assignment to him to secure $125 the execution would be good. *Cross's* interest only extended to any excess over that amount, and to the extent of *Cross's* interest only could the lien be asserted.

THE VICE CHANCELLOR.—Not so; for the alleged lien is anterior to the assignment.

Verity v. *Wylde* (*a*), *Sympson* v. *Prothero* (*b*), *Stokes* on Lien were referred to.

Judgment.

THE VICE CHANCELLOR.—It seems clear that if the lien was for the whole bill, the same lien existed against the client, and the Referee's order must be confirmed, The affidavits shew that (except as to the $58) there was a good payment by *Wilson* to the Toronto firm. The client had a right to pay the money to obtain his papers. It would be hard and very inconvenient to hold otherwise. The fact of the firm being now solicitors makes no difference; they do not forfeit their lien. I think *Bray* v. *Hine* conclusive; see, also, *Schoole* v. *Sall* (*c*). The execution should be stayed. The assignment to *Bain* makes no difference; the lien is prior in date and paramount to the assignment, the solicitors may have strictly a right to execution as to the $58, on the ground that that amount is not paid; but after the cheque being sent him, and considering he is a solicitor over whom the Court exercises jurisdiction; I feel justified in treating the $58 as paid. The appeal is therefore dismissed with costs.

(*a*) 4 Drury. 427. (*b*) 3 Jurist, N. S. 711. (*c*) 1 Sch. & Lef. 176.

1872.

RE CHARLES.

Vendor and purchaser—Title deeds—Crown bonds—Devise of trust estate, &c.

A vendor is bound, at his own expense, to furnish a purchaser with copies of all instruments relating to the title which are not of record.

A purchaser is entitled to copies of title deeds registered by memorials, but not of deeds registered under the Registry Act of 1867.

Where a testator held certain lands as a trustee, to secure a debt due him, and devised the residue of his property to his executors, except such parts thereof as might at his decease be vested in him upon any trusts or by way of mortgage, and then, by a subsequent devise, all the residue of his estate, real and personal, to *J. M.* (whom he also appointed one of his executors), and his heirs absolutely:

Held, that under the second devise the legal estate in the property held in trust passed to *J. M.*

Held, also, that *J. M.* and the executors could by their deed pass all the legal and equitable interest in the trust estate sold.

The testator, under the above circumstances, had joined in certain Crown bonds, which remained undischarged: *Held*, that they formed a charge upon the lands, which the purchaser was entitled to have removed.

[Master's Office, 1872.]

Statement.

Certain lands, situate in Toronto, belonging to the estate of the late *James Charles*, were sold under decree on further directions. It appeared by the abstract of title delivered to the purchaser that the lands so sold were by deed conveyed to *George Michie*, absolutely, and that he subsequently executed an instrument whereby he agreed to hold the lands as a trustee, to sell the property, and, upon the sale, after satisfying a debt due to himself, to pay over the proceeds to *Charles*. The property being thus held, Mr. *Michie* died in January, 1866, having made his will, wherein, after making certain minor bequests, he gave the residue of his estate, except such part thereof as might at his decease be vested in him upon any trust or by way of mortgage, to his executors in the will named; this devise being followed by

1872. another in these terms: "And as to all the residue of the real and personal estate and effects, I give, devise, and bequeath the same, respectively, to my nephew, *James Michie*, his heirs, executors, administrators, and assigns, absolutely."

Re Charles.

It also appeared by the abstract that Mr. *Michie* had joined in some bonds to the Crown, which remained undischarged.

On a reference to the Master, the purchaser raised the following questions:

1st. That the Crown bonds remaining undischarged, they formed a charge upon the property, and should be got rid of by the vendor.

2nd. That the trust estates reserved by the first devise, did not pass under the second, and that, consequently, *George Michie* died intestate as to those lands, and that neither the executors nor *George Michie*, as residuary devisee, could convey the estate so as to pass a good title.

The question as to whether the purchaser was entitled to copies of the title deeds at the vendor's expense, was also left to the Master to decide.

Mr. *John Bain*, for the vendors.

Mr. *J. G. Scott*, and Mr. *W. Fitzgerald*, for the purchasers.

Judgment. MR. BOYD, MASTER IN ORDINARY.—1. Upon the face of the registrations of Crown Bonds (*a*) in connection with the county registrations, it appears that these bonds

(*a*) C. S. U. C. ch. 5.

ostensibly affect the right of *George Michie's* representatives to convey. This is a cloud upon the title which should be cleared off by the vendor. The instrument declaring the trust is not registered; prior to this instrument it is conceded that the title was in *Michie*, subject to a lien for the purchase money. If so, the vendor was quasi-mortgagee, and the Crown Bonds would attach upon the quasi equity of redemption in the purchaser *Michie*. The trouble of clearing the title should rest upon the vendor in a case of this kind. 1872. Re Charles.

2. The deeds registered in this case are so registered, as under the old law, by memorials. The deeds themselves not being on record, as under the present Registry Act the memorials registered are not "records" within the meaning of conveyancers when it is said that the purchaser is not entitled to copies of matters of record. Records in this sense are documents preserved in public repositories, examined copies whereof are admitted in all cases as the best producible evidence: *Leighton* v. *Leighton* (*a*). This touches the reason of the rule as given in Coventry, p. 117, where it is said, "On completion of the contract, the purchaser is not entitled to attested copies of documents on record, as he can, by appealing to the record which is always extant, obtain more authentic evidence than he can by an unsworn copy." In *Cooper* v. *Emery* (*b*), it was said that attested copies of deeds of bargain and sale under 10 Anne, ch. 18, need not be furnished to purchasers, because they can always have access to the enrolment, and by statute the copy of the enrolment is made evidence. That is the state of the law under our present Registry Act, but not so formerly. Memorials are at best but secondary evidence, and the fact of their being registered will not dispense with the necessity of copies of the deeds themselves being furnished to the purchaser. Judgment.

(*a*) 1 Str. 210. (*b*) 1 Ph. 390.

1872.

Re Charles.

3. Two points were urged upon the construction of the will, as shewing that the legal estate in the trust premises in question did not pass.

First: It is argued that the second residuary clause cannot apply to the estates excepted from the first residue and also to the surplus not required for the purpose of paying debts and legacies; that the testator intended to benefit his nephew, and therefore if the choice is to be made between these two, the beneficial property is to be preferred and not the dry legal estate.

Judgment.

Both the language of the testator and authority are against putting this narrow construction upon the second residuary clause. It is not limited to the surplus of the first residue but it expressly extends to all the residue of the testator's real and personal estate and effects. In *Sturgis* v. *Campbell* (*a*) before the House of Lords Lord *Westbury* considered the meaning to be attached to the term "residue" as used in the different parts of a will, and he concludes that the established principle is that the "residue" means the entirety of the whole estate, real and personal, after exhausting the previous directions contained in the will. Lord *Cranworth* says in the same case that this word always means that which has not previously been given, and is so far of a flexible meaning and interpretation that as the amount of the charges differs, the amount included in the residue will be different. The case of *Goodtitle d. Hart* v. *Knot* (*b*) is of itself enough to shew that not only the surplus undisposed of under the first residuary clause, but estates excepted therefrom will pass under the second residuary limitation. In addition, reference may be made to *Loftus* v. *Stoney* (*c*), *Re Harries* (*d*), and *Morrice* v. *Langham* (*e*), *Doe* v. *Weatherby* (*f*).

(*a*) 12 L. T. N. S. 836. (*b*) 1 Cowp. 43. (*c*) 17 Ir. Ch. R. 195.
(*d*) Johns 205. (*e*) 11 Sim. 274. (*f*) 11 East 322.

1872.

Re Charles.

But again it is argued that the dry legal estate in the testator's trust and mortgage estates the beneficial interest wherein goes to the executors was not intended to be devised to the nephew, and that as to this legal estate there is an intestacy. It is conceded if the beneficial interest in the trust estate in question is vested by the will in the nephew that the words are large enough to convey the legal estate therein to the same person. Take it then that the mere legal estate is to be found, and I entertain no doubt upon the words of this devise that the question is concluded by the strongest authority. Before Lord *Braybroke* v. *Inskip* (*a*), decided in 1803 there was great fluctuation in the law but it was then laid down by Lord *Eldon* that trust estates pass under a general devise unless it can be collected from expressions in the will or the purposes and objects of the testator that he did not mean they should pass. This was just bringing back the rule as expounded in *Marlow* v. *Smith* (*b*), and so it has remained unimpeached to the present time. In the latest case upon the subject *Martin* v. *Laverton* (*c*), *Malins*, V. C., recognizes the rule while finding in the case he was dealing with, purposes quite inconsistent with the intention to devise anything of which the testator was not beneficial owner.

Judgment.

In *Ex p. Morgan* (*d*), it was held that the legal estate in mortgaged property did not pass by devise of all real estate, because the property devised was subjected to the payment of an annuity, which was a purpose to which such an estate was not applicable. So in *Ex. p. Marshall* (*e*), the legal estate in mortgaged property was held not to pass, because the general devise was in trust to sell, and it could not be sold without a breach of trust, which the Court would not assume the testator to have intended.

(*a*) 8 Ves. 420. (*b*) 2 P. W. 198. (*c*) L. R. 9 Eq; 563.
(*d*) 10 Ves. 101. (*e*) 9 Sim. 555.

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Re Charles.

So in the case of a trustee who devised all his real estate whatsoever and wheresoever charged with a legacy it was held that the trust estates did not pass: *Hope* v. *Liddell* (*a*).

In like manner, in the case of a devise of all the testator's real and personal estate to his nephews and nieces as tenants in common, they being a numerous and an unascertained class, the general words were held not to pass estates vested in the testator in trust or in mortgage: *Re Finney's* estate (*b*).

In all the cases I have found where dry trust estates did not pass under general words the reason appears to be, that to give such an effect to the devise would be to cause the testator to work a breach of trust by limiting estates in a manner incompatible with his duty as trustee, or to work such vast inconvenience either by the severance, or the complicated devolution of trust estates that the Court prefers to declare a partial intestacy as to such estates. See *Tudor's* L. C. on R. P (*c*); *Rackham* v. *Siddall* (*d*).

Judgment.

On the other hand, *Turner*, V. C., held in *Re Field's* mortgage (*e*), that a devise of all the residue of estate, real and personal, property, moneys, securities for money and all other effects which shall remain after the payment of debts, &c., to testator's wife for her own use and benefit carried the legal estate in the mortgaged premises. See *Re King's* estate (*f*). As regards cases of dry legal estates held in trust the following have placed the law upon an incontestible footing: *Langford* v. *Auger* (*g*), where a devise by a mere trustee of all his real and personal estate for all his estate and interest

(*a*) 21 Beav. 183.
(*b*) 3 Giff. 465.
(*c*) p. 883.
(*d*) 12 Jur. 640.
(*e*) 9 Ha. 414 (1851).
(*f*) 5 DeG. & Sm. 644.
(*g*) 4 Ha. 313.

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therein carried the legal estate in the trust land. So, as to a devise of all real estate not before disposed of to devisee *for his own use and benefit*, it was held that a dry trust estate passed: *Bainbridge* v. *Lord Ashburton* (*a*). It was here said by *Alderson*, B., that in order to prevent the trust estate passing to the devisee there must be words to confine the devise to that property in which he was to have the beneficial interest, and that the mere words "to his own use and behoof or benefit" will not alone have that effect. Upon words the same as to the devise *Wigram*, V. C., in 1848, held that dry trust estates passed: *Sharpe* v. *Sharpe* (*b*).

Judgment.

In the same year that *Bainbridge* v. *Ashburton*, was decided *Shadwell*, V. C., held in *Ex. p. Shaw* (*c*), that a devise by a mere trustee of all his property for all his estate and interest therein to a devisee for her absolute use and benefit, and to be disposed of by deed or will as she may think fit, carried the trust estate. A similar holding by *Kindersley*, V.C., is to be found in *Lewis* v. *Mathews* (*d*), where he said that the words "sole and absolute use" in the limitation, indicated that the absolute interest in the property was given, and he held that these words were not enough to prevent the dry legal estate passing thereunder. Here the only word that can be relied upon to shew the testator's intention that the dry trust estates should not pass is where it is said that the nephew is to hold "absolutely." It would be a "throwing back of the law" to use Vice Chancellor *Parker's* expression now to determine that there is anything in this devise to prevent the passing of trust estates thereby. I am by no means clear upon the words of the exception in the first residuary clause, that any beneficial interest in the mortgage and trust estates passed to the executors by virtue of that bequest

(*a*) 2 Y. & C. Eq. Exch. 347 (1836).
(*b*) 17 L. J. Ch. 384; S. C. 12 Jur. 598.
(*c*) 8 Sim. 159.
(*d*) L. R. 2 Eq. 177.

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See *Richards* v. *Patteson* (*a*), but supposing it did, it was only in so far as might be necessary to pay debts, legacies and the like, and thereafter the beneficial interest passed to the nephew. Under a certain state of facts then, the beneficial interest would unite with the dry legal estate in the nephew, and so full effect would be given to the word "absolutely." In this point of view, the matter in contest is substantially covered by the late case *In re Stevens'* will (*b*), where there was a direction to pay debts, a charge of legacies and executors appointed, and then as to the residue a devise to *J. T.*, for her own absolute use and benefit. The question was as to the legal estate of a mortgage in fee, and *Gifford*, V. C., held that it passed to the devisee. He said that the modern authorities have extended the cases in which the legal estate has been held to pass; and that good sense and convenience required that a beneficial gift should carry the legal estate in a mortgage as an incident, and a useful and necessary incident to the beneficial ownership. The trust estate in question here is substantially a mortgage, the land being held in trust to secure a debt: so that upon the whole review of authorities, and in whatever aspect the case is considered I find no reasonable doubt but that the nephew and executors can here make a good conveyance passing all the legal and beneficial interest in the trust estate which has been sold.

Judgment.

(*a*) 15 Sim. 501. (*b*) L. R. 6 Eq. 597.

1872.

Ross v. Ross.

Legacies, where amount very small.

Where no letters of administration have been taken out, and a legatee was entitled to a very small sum, an order was made for payment out of the amount to the solicitors of the legatee without letters of administration, he undertaking to apply it as intended.

[January, 1872.]

Under the will of the testator, *George Ross*, Mrs. *Hugh Ross* became entitled to a legacy of £50, and there was standing in Court to the credit of this matter the sum of $28.40, being the proportion applicable to the legacy, after payment of debts. Mrs. *Ross*, it appeared, died about ten years ago in Glasgow, in Scotland, intestate, leaving two daughters, her only children; and an order was now asked for the money to be paid out of Court to them, without requiring them to take out letters of administration. It was contended that to require them to do so would, in fact, be to deprive them of this money, as the expense of obtaining administration would consume the greater part of the money, if not the whole amount, and they were in poor circumstances.

Mr. *Blake*, for the application.

Mr. TAYLOR, REFEREE IN CHAMBERS.—On looking at the English practice I find that where persons have died intestate, entitled to sums not exceeding £20, payment has in such cases been ordered to the persons entitled to take out letters of administration, without requiring them to have been actually granted. Judgment.

In Re Cable (*a*) there were in Court two sums of £80 and £60, to which two married women were respectively

(*a*) 3 W. R. 84.

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entitled. They having died intestate, the husbands applied to have the money paid out to them, without letters of administration being taken out; and Vice-Chancellor *Stuart* made the order subject to the Registrar's finding authority. A case of *Bradbury* v. *Yorke*, before Vice-Chancellor *Knight Bruce*, having been produced, the motion was at the desire of the Vice-Chancellor spoken to before the Lords Justices, by whom the order was refused (*a*), on the ground that these women might have left debts, to the payment of which this money might be applicable.

Vice-Chancellor *Kindersley* in *Callendar* v. *Teasdale* (*b*), made an order to pay out of Court £13 to the widow of a person entitled to the money, without administration. *Re Cable* was cited to his Honour, and also *ex parte Wodroffe*, in which a similar order had been made for paying a sum over £13, but under £20. An order was made in *King* v. *Isaacson* (*c*) for paying out £6 7*s*. 3*d*., and there a case of *Piper* v. *Berb*, was referred to as one on which Vice-Chancellor *Kindersley* had sanctioned the payment of a small amount.

Judgment.

In *Hinnings* v. *Hinnings* (*d*) where it appeared by the certificate that none of the shares coming to the estate of the deceased legatees amounted to £20, and that no person had obtained letters of administration to any of such legatees, Vice-Chancellor *Page Wood* ordered the shares of the married women who had died to be paid to their husbands, and the share of the testator's nephew to be divided among his next of kin.

As the sum here is very small, I think I may safely follow these cases and order payment. One of the daughters lives in Guelph, and the other in Scotland,

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(*a*) 8 W. R. 280.
(*b*) 8 W. R. 289.
(*c*) 9 W. R. 369.
(*d*) 2 H. & M. 82.

and payment of the money is asked to an uncle who undertakes to pay over to them; but as he is resident in the United States, I prefer, in this case, ordering a cheque to issue to Mr. *Blake*, he undertaking, as in *Piper* v. *Bull*, to apply the money properly. 1872. Ross v. Ross.

Re Adams.

Quieting Title's Act—Notice—Evidence, &c.—Trust estate.

Whether trust estates escheat, &c., considered.

[January, 1872.]

This was a proceeding under the Quieting Titles Act, before the Referee at Goderich, which afterwards came before the Inspector of Title for revision.

Mr. Taylor.—Waiving, for the present, any question as to the sufficiency of the notice served upon the persons named in the petition as possible contestants, and assuming that even had they appeared, they could not have contradicted the evidence given, I think the Referee has arrived at an erroneous conclusion. Judgment.

The petitioner claims the property under the following circumstances: he and his brother were the patentees of the Crown, and, in 1863, they made a mortgage to *F. H. Heward* and another, which still remains a valid charge upon the property. Soon after, the petitioner sold and conveyed to his brother his undivided half, taking back a mortgage upon the whole to secure payment of the purchase money, which still remains unpaid. The brother died in October, 1867, unmarried and intestate; and the petitioner has obtained letters of administration to his brother's estate.

The ground upon which the petitioner rests his claim to the property is, that his brother, being illegitimate,

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he, as mortgagee, became entitled, upon his death intestate, to hold the property absolutely. The Referee has certified that the petitioner is entitled to a certificate of his title as prayed, subject to any claim of the Crown, and to the mortgage mentioned in the petition. The title prayed by the petition is as absolute owner, subject to the mortgage to *Heward*.

Judgment.

There is no doubt that the rule that there is no escheat of a trust estate, applies to the equity of redemption of a mortgage in fee: the reason given being, that the mortgagee is the legal tenant whose service is all that the Crown or other lord of the fee can of right require; and in such a case the equity of redemption becomes extinguished in the estate of the mortgagee. He, however, does not take it absolutely, but as assets for payment of the debt of the mortgagor, whose personal representative has a right to redeem (*a*). This seems now settled; although Lord *Eldon*, in one case, thought the mortgagee might refuse to be redeemed (*b*). Here the legal estate is outstanding in *Heward* and his co-mortgagee, so that upon the death of the petitioner's brother, the equity of redemption became extinguished in their estate, and they now held the property subject, however, to the debt of the mortgagor, and to be redeemed by his personal representative.

It is said the petitioner is the personal representative, though I do not find the letters of administration among the papers; nor does it appear from the schedule of papers produced that they were before the Referee. How he obtained these does not appear. I presume only after the Crown had been cited; properly, administration in such a case is granted only to the nominee of the Crown (*c*).

(*a*) Burgess v. Wheate, 1 Ed. 211; Beale v. Symonds, 16 Beav. 416.
(*b*) Gordon v. Gordon, 3 Swan, 470.
(*c*) Stole v. Tyndall, Cas. T. Lee 394; Manning v. Napp, Salk. 37.

It does not seem quite clear how the personal representative would hold the land in the event of redeeming *Heward*. The Master of the Rolls said, in *Burgess* v. *Wheate* (*a*), the Court would compel the mortgagee to reconvey to the personal representative, and, if necessary, would consider the estate reconveyed as coming in lieu of the personalty and assets to answer even simple contract creditors. If the petitioner, as personal representative, would hold the property after such redemption as personal property, then he would hold the surplus, after paying the debts, for the Crown (*b*).

That he is not the nominee of the Crown, or that he was appointed without the Crown being cited makes no difference, the administrator, whoever he is, is only a trustee for the Crown. Being also himself a submortgagee he may, perhaps, be entitled, on paying off *Heward*, to take an assignment and himself hold the property subject to the debts. But as this is a question in which the Crown is interested, notice must be given to the Attorney General.

Judgment.

So far I have been assuming that the evidence is sufficient for making out the facts upon which the petitioner relies, but it is really not so. The only evidence upon many important points, such as the possession of the property, that the brother died intestate, unmarried, and that the petitioner is the personal representative, rest solely upon the unsupported evidence of the petitioner himself. Other evidence of the possession can easily be got, and the production of the letters of administration themselves is the proper evidence of intestacy, and that the petitioner is the personal representative.

(*a*) 1 Ed. 211.

(*b*) Jones v. Goodchild, 3 P. W. 33; Rutherford v. Maule, 4 Hagg. 213; Duke v. Walford, 6 Notes of Cases 309; Kane v. Reynolds, 4 D. M. & G. 571; Megit v. Johnson, 2 Dougl. 547.

1872.

Re Adams.

Then the notice given to the persons named in the petition as possible contestants, the other brothers and sisters is not sufficient. The notice itself is not sufficient, it is only a copy of the advertisement. In such a case as the present it should shew plainly on its face the ground upon which the petitioner claims the property, so that the parties served may have their attention distinctly called to the case which they are called on to meet.

Besides, the only service upon these people of even this imperfect notice was by mailing a copy to their respective post office addresses, and there is no evidence of these being their correct addresses, except the petitioner's own statement. They seem all, assuming the addresses given to be correct, easily accessible, except *Henderson*, and can be served without much expense. A notice such as I have mentioned above should be served upon them, except *Henderson*, who has clearly no interest in the question in dispute, personally, or by leaving it with a grown-up person at the dwelling house, unless under the peculiar circumstances of this case some reason can be given why such service should in the case of some of them be dispensed with. Notice must also be given to *Heward* and his co-trustee.

Judgment.

The certificates of the sheriff and county treasurer are not sufficient (*a*), and proper ones must be given.

There is also no affidavit from the person named in the advertisement upon whom notice of any claim was to be served, to negative the fact of any such having been served.

No inquiry seems to have been made as to Crown debts. This must be attended to.

(*a*) Taylor on Titles, 36, 38, 181, 182.

1872.

SEFTON v. LUNDY.

Compelling attendance of a party out of jurisdiction for the purpose of being examined.

A plaintiff, desirous of obtaining the evidence of a defendant who resided out of the jurisdiction and could not be served personally, paid a sufficient sum to the defendant's solicitor for conduct money, and moved for substitutional service of a subpœna on the solicitor, and that if default was made in attending, the bill might be taken *pro confesso*. The application was refused with costs.

[February, 1872.]

Mr. *Wells* moved for an order allowing substitutional service of a *subpœna ad testificandum* on the solicitor of Mrs. *Blackburn*, whose evidence he desired to take at the hearing during hearing term, commencing 12th March next. He had paid the conduct money from Detroit, where she was understood to be living, but he could not serve her personally, not knowing her address more particularly; and he also asked for an order that, if such defendant did not appear to be examined, the bill might be taken *pro confesso* against her. Argument.

Mr. *Evans*, contra. The motion is premature; it is not to be assumed that the defendant will not attend—the presumption is the other way; it is her interest to be present, and she most likely will be. It is time enough to make such a motion at the hearing, if she fails to attend. Section 15, chapter 32, Consolidated Statutes, does not apply to parties out of the jurisdiction.

Mr. *Wells*, in reply. It is no hardship on the defendant to bring her here to state her own case, and if we go to the expense of paying her conduct money, it is very reasonable that such an order as we ask should be granted. It might prejudice our position to wait until the hearing. We are anxious to do everything we

1872.

Sefton v. Lundy.

can be called on to do, to secure her attendance, and an order for substitutional service on her solicitor would only be fair under the circumstances.

MR. TAYLOR, REFEREE IN CHAMBERS.—The present is a somewhat novel application. The plaintiff, desiring the attendance, as a witness, at the hearing, of one of the defendants, upon whom he is unable to effect personal service, has given notice to her solicitor under the provisions of Consolidated Statutes, Upper Canada, chapter 32, section 15, and has paid a sum which is admitted to be sufficient for conduct money. The hearing of the cause will take place during the term which commences on the 12th of March next. The motion now made is for an order that the defendant do, in pursuance of the notice served on her solicitor, attend at the hearing to be examined as a witness, and that if she shall not attend in pursuance of such notice, her non-attendance

Judgment.

may be taken as an admission *pro confesso* against her.

The Statute does not warrant any such application being made in advance. It says, that if the party does not attend, such non-attendance shall be taken as an admission *pro confesso* against him, unless otherwise ordered by the Court or Judge before whom the examination is pending. The General Order 144 of our own Court does not confer any independent jurisdiction. Now, the examination is not pending before me, nor is it at present pending before any one. When the cause is called on during the term, it will then be pending before the Judge, who, in the event of the defendant not attending, may make such order as the circumstances of the case require.

There is, however, another fatal objection to the application being granted. This defendant is resident, at present, in the city of Detroit. Whether she is a British subject or not is of no moment; she is at pre-

sent resident out of Upper Canada. Now, though it was argued that the words of the Act are wide enough to cover the case of a plaintiff resident abroad, yet the next section shews that section 15 was never intended to apply in such a case. 1872. Sefton v. Lundy.

It is not, however, necessary for me to consider this point, as I find it has been already decided. The late Mr. Justice *Burns* held, on circuit, in *Patchin* v. *Davis* (*a*), that the 16 Victoria, chapter 19, section 2, from which the section of the Consolidated Statute is taken, did not apply to a party out of the jurisdiction; and this ruling was upheld by the Court of Queen's Bench on motion for a new trial (*b*). This case was afterwards followed in *Tyre* v. *Wilkes* (*c*).

The solicitor for the plaintiff asked on the motion that if the order applied for could not be made, he might have an order for a special *subpœna* under Consolidated Statutes of Canada, chapter 79, section 4, and that he might be allowed to serve the *subpœna* upon the solicitor for the defendant. That clause of the statute, however, does not apply to a party or witness out of Canada: it only authorizes a *subpœna* issuing to compel attendance of a witness "wherever he may be in Canada." Besides, no order could be made for substitutional service of a *subpœna, ad testificandum*, or *duces tecum*. It is said in *Daniell's* Practice (*c*) that the service of such a *subpœna* must, in all cases, be personal. If it were otherwise, the provision in the statute for serving an eight days' notice on the solicitor would be wholly unnecessary. The motion must be refused with costs. Judgment.

(*a*) 10 U. C. Q. B. 639. (*b*) 18 U. C. Q. B. 46.
(*c*) Page 840.

1872.

RE DOLSEN.

Quieting Titles Act.

Whether a mortgage in the short form, under the statute 27 and 28 Vic., ch. 31, executed by the tenant in tail, has the effect of barring the entail.—*Quære.*

[February 20, 1872.]

This question arose on a petition under the Quieting Titles Act.

MR. TAYLOR, REFEREE IN CHAMBERS.—The petitioner is, under his father's will, tenant in tail, in possession of the land in question. He asks, however, a certificate of title as owner in fee simple, subject to a mortgage in fee to one *Scane*, claiming that the effect of this mortgage is to bar the entail (*a*).

Judgment.

Mr. *Leith*, in his Real Property Statutes (*b*), speaking of a mortgage in fee made by a tenant in tail, says: "On a mortgage in fee the equity of redemption will belong to the mortgagor,—not as tenant in tail, but freed of the entail, and descend to heirs general instead of to the heirs in tail." No authority is cited in support of this statement. Mr. *Shelford*, when treating of the corresponding clause in the English Statute (*c*) does not consider this as quite clear.

He accordingly says, that "in mortgages in fee, whether of freeholds or copyholds, when it is intended that the equity of redemption shall be discharged from the entail without any further assurance, it will be proper to frame the proviso of redemption, not so as to make the estate of the mortgagee *void* on payment of the money, but to direct that he shall reconvey it to the uses intended, for if the condition in the former case

(*a*) Con. Stat. U. C., c. 83, s. 10. (*b*) Page 388.
(*c*) Shelford Rl. Prop. Stat. 350.

should be performed, it might be contended that the tenant in tail became seised of his former estate tail." 1872. Re Dolsen.

The mortgage in the present case is in the short form under the statute; (*a*) the proviso being, that upon payment the mortgage shall be void. The best course for the petitioner to adopt will be to execute a disentailing deed, and thus remove any doubt on the subject.

It may be remarked that even in any case, it is doubtful if on payment, taking a certificate of discharge under the statute will have the effect of giving the mortgagor an estate in fee simple, the statute saying that such a certificate, when registered, shall be as valid and effectual "as a conveyance to the mortgagor, &c., of the original estate of the mortgagor." Judgment.

Harrison, Osler, and *Moss,* Solicitors for Petitioner.

DENISON v. DENISON.

Staying sale, purchaser—Forfeiture.

Although the Court is averse to interfering with sales under decrees or orders of the Court, yet, where a sufficient case is made, it will nevertheless grant indulgence to a purchaser in aid of carrying out a sale previously made, and when a re-sale is about to take place.

Where a re-sale had been advertised and was about to take place, the purchaser who was a devisee and had reason to expect to receive a balance from the estate, in which he was disappointed, and had been unable to carry out his purchase sooner, applied for a stay of the re-sale, he was let in to complete his purchase on payment of costs, and of the purchase money, into Court with subsequent interest, and of $100 to cover his share of costs of second sale, and of the application.

[February 20, 1872.]

Mr. *Kennedy* moved to stay a re-sale of certain property part of the estate of the late Mr. *Denison.*

(*a*) 27 & 28 Vic. c. 31.

1872.

Denison v. Denison.

On the part of the applicant *Richard L. Denison*, a residuary legatee and devisee under the will, it was alleged that he anticipated that he would be entitled to a large sum on the final distribution of the estate, and in that expectation he purchased the lands in question. He had paid a small sum on account of purchase money and incurred some expense in fencing, but the bulk of the purchase money was still unpaid. He had made exertions to obtain the money, and entered into a verbal agreement to re-sell, but the purchaser had declined to pay when he found the land advertised for sale. That if time was given he could complete the purchase; that to lose his bargain would be very injurious to him; that there were other assets of the estate still uncollected, and these moneys were not immediately required to wind up its affairs. The amount now claimed is larger than that which the property was formerly sold for by some $160.

Argument.

Mr. *T. Moss*, for *C. L. Denison*, also a residuary legatee. The sale has been advertised, and now at the last moment a stay is asked. Property has gone up since the former sale, and the applicant seeks to get the benefit of the rise. The order for re-sale was made after notice. *Denison* had the option of carrying out the purchase and has not done so (though the sale took place on 6th July, 1867, and the affairs of the estate have been nearly wound up). He ought to have come promptly when asking an indulgence. It is evident he merely desires to substitute some other purchaser than himself. He has no right to speculate in this manner. He should shew that he was making no profit out of the transaction; he cannot traffic with these lands of the estate until he completes his purchase. He avoids declaring whether he has really a sub-purchaser. There is no offer to pay the money into Court. It is not shewn he is ready with the money. Great laches were shewn on purchaser's part, whilst the vendor's had done nothing

1872.

Denison v. Denison.

wrong, had not misled the purchaser in anything. No case of that kind is set up. It would damp future sales and is against the policy of the Court to stay a sale under these circumstances.

Mr. *Hamilton*, for Mrs. *Simms*, a legatee, also urged the impolicy of granting such an order, and the laches on part of the purchaser. The purchaser is not in the same position as a mortgagor who seeks time, when time for payment of purchase money is asked. The applicant should shew fraud or special circumstances; time has already been given in settling the advertisement for sale. No equity has been shewn on part of purcheser for such an indulgence as is asked.

Mr. *Kennedy*, in reply. The only argument that calls for reply is, that there is a substitutional purchaser. The purchaser had a right to re-sell if he could, but in fact there was no sub-purchaser. The family had taken the matter up, and were endeavoring to save the property. There are other lands unpaid for, and this will not delay the winding up the estate. The delay has not been wholly on the purchaser's part. The order for re-sale was not served on him personally.

Judgment.

MR. TAYLOR, REFEREE IN CHAMBERS.—On looking into the English practice I find that the order made on the 29th June, last, follows the form in use in England since, at all events, 1848 (*a*), two years before *Robertson* v. *Skelton* (*b*) was decided. That case seems an authority for granting the present application. There the delay on the part of the purchaser was as great as in the present case. The sale took place in July, 1846, the order for re-sale and payment of the deficiency was made on 23rd April, 1850, and the application for leave to pay the money was on the 6th of August following.

(*a*) 2 Seton 1210, (*b*) 13 Beav. 91, and see Dart. V. & P. 1111.

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Here the sale was in July, 1867, and the order for resale in June, 1871. Here, too, there is another circumstance in favor of the purchaser; he is one of those beneficially interested, and he says he hoped at the time he purchased, that his share of the estate would be applicable towards paying off the purchase money. In this he is disappointed, the final taking of the accounts in June, 1871, shewing a balance against him. I do not think I should assume that he hopes to pay for the land now by substituting some other person, to whom he has sold, as purchaser in his place, or that he has now sold the land at a profit. He says he did sell the land verbally, a thing he had a right to do, the sale having been confirmed, but that the purchaser refused to complete the purchase.

Judgment.

The alleged rise in the value of the land is also not a circumstance which should prevent his being allowed to carry out his purchase now. In *Robertson* v. *Skelton* the value of the property had been increased by the death of a person entitled to a life estate, the sale having been originally of a reversionary interest only.

It is no doubt quite true, as urged for the respondents that the Court is unwilling to stay a sale as being likely to have an injurious effect on sales under the decree of the Court generally; but there will not be any more prejudice done by staying the sale here, than there would be if this had been the case of a sale in a mortgage suit, and the mortgagor were to come forward at the last moment and pay the debt. His right to do so could not be disputed. Besides here the sale will not be stayed. Other lots are included in the advertisement, and only the lots purchased by Mr. *Denison* will be withdrawn In *Robertson* v. *Skelton* the Master of the Rolls gave the purchaser four days to pay in the money. Here the sale takes place on Saturday next, the 24th, and as the purchaser has delayed so long in making the application,

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the order I make is, that upon his paying into Court on or before Friday the 23rd, the amount mentioned in the order of the 29th June, and subsequent interest, also the sum of $100 to cover the proportion of the costs of the second sale properly chargeable against him, then the lots purchased at the former sale by Mr. *Denison* are to be withdrawn. It is alleged that an error has occurred in computing the amount named in the order of the 29th June, and an account may be taken of the true amount by the Master when the costs are taxed, or an account may be taken in Chambers.

MEYERS v. MEYERS.

Setting aside sequestration.

A writ of sequestration had been taken out in a cause in which an order to revive had issued against the parties who would have represented the estate of a supposed intestate, had be been such; but a will had been subsequently found, and the revivor, it was contended, was irregular.

A motion to set aside the writ of sequestration on this ground, and on the grounds that the defendant had proved, under the decree in the suit said to be thus irregularly revived, and that there were prior creditors to him, was refused with costs.

Semble,—The proper course, under such circumstances, would be to move against the order of revivor.

[January, 1872.]

Mr. *Bain*, for the plaintiff, moved to set aside the sequestration issued in the cause of *Harris* v. *Meyers*.

Mr. *Hodgins*, for defendant *Turley*.

Mr. *C. Moss*, for certain tenants under a lease settled in Chambers in the suit of *Harris* v. *Meyers*.

Mr. *Machar* appeared for *Brant*, a judgment creditor.

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Mr. *Bain*—The rights of the tenants will not be endangered by setting aside the sequestration. All they can claim, at any rate, will be compensation, and this is stipulated for in the lease. The writ of sequestration is irregular; it was issued in a suit which had not been properly revived, and the proceedings were irregular — the proper parties not being before the Court when the writ issued. The revivor was against an intestate's estate. Afterwards a will was discovered, and the suit should have been revived against the parties interested under the will; and this has not been done. The former revivor was irregular, and the leases were made since. *Turley*, a defendant, claimed to be the absolute owner of a certain claim, in which it is now admitted he had only a mortgagee's interest. *Turley* was not in a position to represent *Harris's* estate, having only an equity of redemption. The fact that the will was not sooner found may account for the mistake, but is no answer to the present application. If the proceedings are irregular, the sequestration must fall.

Argument.

Mr. *C. Moss* contended that such an application as the present could only be made by a party who, under the former practice, could have come in and claimed to be examined *pro interesse suo;* and under that practice he must have applied in Court, not in Chambers. The lessees cannot be injuriously affected by any steps taken by the plaintiffs. The rights of the tenants have been ratified and confirmed by the Court, and cannot be set aside by the action of parties in another suit, proceedings of which they had had no notice. The question of priorities can not be entertained here. The tenants have made improvements in good faith, and have paid rent in advance, and are entitled to be recouped under any circumstances. By the terms of the lease they are entitled to six months' notice. The Court has provided protection for the tenants, and they must have notice of

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Meyers v. Meyers.

any proceedings that affect them. This is only reasonable, and should be strictly enforced against the plaintiffs. The tenants are not affected by the acts of other parties, or the irregularity of the proceedings—of which irregularity they had no notice. They acted on the same assumption as did the Court. The present motion should be dismissed with costs.

Mr. *Hodgins*.—The Court will not discharge a sequestration because the suit has been irregularly revived. The correct practice is to grant an order that, within a certain given time, the suit be regularly revived; but here the parties moving have treated and recognized the revivor as regular. They should, to give them the right to move, have come promptly. A technical irregularity must be moved against without delay: *Harris* v. *Meyers* (*a*). The plaintiffs are in fact moving for a third time for the same relief: see the former applications. There are no affidavits to shew that they did not know long since of the existence of a will, and could have moved much sooner. As to the priorities between the claimants, the plaintiff has nothing to do with them: *Stewart* v. *Stewart* (*b*).

Argument.

Mr. *Bain*, in reply: It is admitted that the suit is not properly revived, and it is urged that the suit will hereafter be properly revived; but if so, it does not follow that the irregular proceedings will become regular. The question is not now whether the suit can be properly revived, but whether it was not improperly revived before. It may be very questionable, however, whether it can now be properly revived. The creditors are the parties most interested, and they are right in asking the aid of the Court in making the most of the assets. As to this being similar to former motions, the grounds now moved on did not exist when former motions were made. The

(*a*) 2 Cham. Rep. 248. (*b*) 10 Grant, 169.

1872. improper revival of suit was not then known; the will had not then been found; and such motions can be no bar to the present application.

Meyers v. Meyers.

MR. TAYLOR, REFEREE IN CHAMBERS.—The grounds upon which the plaintiffs rely for setting aside the writ of sequestration issued in *Harris* v. *Meyers*, now, by revivor, *Turley* v. *Meyers*, resolve themselves into three: That the order of revivor is irregular; that *Turley* has brought his claim into the Master's Office under the decree in this suit; and that there are creditors whose claims are prior to that of *Harris*, and against whom the sequestration is therefore void. The notice of motion does not ask to set aside the order of revivor itself.

The order of revivor is objected to on two grounds: first, that the suit has been revived against the heirs of *E. W. Myers* as if he had died intestate, while in fact he left a will by which he devised his estate to one *Cross* upon certain trusts. *Cross* is not made a defendant by the order of revivor. The order appears to have been made in April, 1869; it was amended as to the names of some of the parties by an order made in the May following, and, by a subsequent order, the name of *Sophia Myers* was struck out, she having moved against the order. The will of the original defendant, *E. W. Myers*, was not proved until some time in 1871. The plaintiff *Turley* was not aware of the existence of this will, and seems to have taken proper steps to enquire into the true facts before taking out the order of revivor, as in the case of intestacy. The widow of the defendant was not aware of the existence of this will, for she made an affidavit that she had no will or testamentary paper in her possession, nor did she know of the existence of any such. The adult children of *Myers* seem also to have been unaware of the will. They were all made parties, defendants, by

Judgment.

1872.

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the order of revivor, but none of them moved against the order, nor did they inform *Turley* or his solicitor that such a will existed until after it had been proved. Under these circumstances, I cannot say there was any such suppression of material facts as would justify the setting aside of an *ex parte* order on the ground of concealment. The fact that the order makes the wrong parties defendants does not seem to me to render the order irregular in the sense which would justify my making an order in Chambers for setting it aside. Suppose, instead of an order of revivor, this had been a bill filed by *Turley* against the children of *Myers*, alleging his death intestate. That he did not so die would be no ground for taking the bill off the files as irregular. The defendants would set up the facts by answer, which would occasion a necessity for the plaintiff amending. If the will was not discovered until too late for setting up such a defence by answer, the subsequent discovery of its existence would be a ground for allowing a supplemental answer to be filed (*a*). So here, the subsequent discovery of the will, if the parties can shew they were not previously aware of its existence, might be a ground for allowing them to move against the order of revivor, although the time allowed for doing so has long since elapsed.

Judgment.

To the other objection, that the order of revivor here is by *Turley* as the assignee absolutely of *Harris's* judgment, while he is really only a mortgagee of his interest, there is the same answer as to the former. Had *Turley* filed a bill, the absence of any one representing the estate of *Harris* might, if it appeared on the face of the bill, have been taken advantage of by demurrer; if it did not, the defendants, if aware of the objection, might, by answer, have set up the fact, and

(*a*) 2 Beav. 236; 5 Beav. 432; McKinnon v. McDonald, 2 Cham. Rep. 23.

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alleged the want of necessary parties. How the fact is I do not know, but *Turley* may be legally the absolute owner of *Harris's* interest; the equitable interest of *Harris's* representative may be a matter of private arrangement between the parties, in which case, so far as I can see, the defendants would not be prejudiced by the absence of any one representing *Harris*. If the facts were till recently unknown to them, and they were, by the absence of such representative, in any way prejudiced, it might, as in the former case, be a ground for giving leave to move against the order, but I cannot see that the order is irregular.

The second ground, that *Turley* has come in under the decree in this suit, does not seem to furnish any reason for setting aside the writ of sequestration as irregular. If the sequestration was regular when issued, a proceeding taken by any of the parties subse-

Judgment.

quently cannot render it irregular. Such an act may render it inequitable that the party should any longer enjoy the benefit of his sequestration; and in such a case an application to the Court to discharge the sequestration might be made—just as in a suit like the present the Court may by injunction restrain a judgment creditor from taking any proceedings by execution against the estate being administered. Whether, however, the Court would do so would depend upon a great many circumstances, and, even if Chambers were the proper place, I have not before me sufficiently the facts upon which to decide such a question. *Turley* may be entitled to prove, and also to hold, the advantage he has gained under his sequestration. All these, however, are questions which cannot, I conceive, be raised and decided in Chambers upon a motion to set aside a writ for irregularity.

The only remaining ground alleged for setting aside the writ is, that there are prior creditors upon whom

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Meyers v. Moyers.

the sequestration is not binding. It is objected that there is no evidence on this motion that there are any prior creditors, and that, even if there is held to be sufficient evidence of that fact, the plaintiffs cannot here set up the rights of these creditors. The plaintiffs, in answer to that, claim that, a decree having been made for sale, they, as vendors, represent for all purposes connected with the sale, and for getting incumbrances on the estate removed, all the other parties, and can therefore make this application. Perhaps they are right. Assuming that they are, and that there is sufficient evidence of there being creditors prior to *Turley*, the existence of such creditors does not make the sequestration irregular. Apart from questions which may be raised as to whether these parties have not, by their conduct, lost their priority, the mere fact that there are persons who claim by a title paramount does not render a sequestration irregular.

Judgment.

The proper course to be pursued by any person who claims title to an estate or other property sequestered, whether by mortgage or judgment, or otherwise, or who has a title paramount to the sequestration, was, formerly, to apply for leave to be examined *pro interesse suo* (*a*). Now he should take proceedings under General Order 398.

That a judgment creditor, though prior, must, if the sequestration be executed, come before the Court in this way, is clear from the language of Lord *Eldon* in *Angell* v. *Smith* (*b*), and a mortgagee with a clear title to take possession, must adopt the same course.

As to the position in which the tenants stand, I do not think, even if I had set aside the sequestration, I could have ordered them to deliver up possession until

(*a*) 2 Dan. Pr. (Perk. ed.) 1268. (*b*) 9 Ves. 337.

1872. they had received the notice specified in their leases. They acquired their interests under a decree of the Court regularly obtained, and a writ regularly issued to enforce that decree. They had no knowledge of the existence of the will any more than *Turley* or the family of the testator.

Meyers v. Meyers.

Even if I had held the order of revivor irregular, and that the suit of *Harris* v. *Myers* has never in fact been revived, *White* v. *Hayward* (*a*) would seem to be an authority for giving the plaintiff time to revive, keeping the sequestration in force until he could do so. As the plaintiffs have, even if entitled to have the sequestration set aside, mistaken the proper forum, I must refuse this application with costs.

Judgment.

DONELLY v. JONES.

Security for costs, bonds for, notice of motion for irregularity—Affidavits of justification.

It is no objection to a bond for security of costs that there is no affidavit of execution annexed.

Neither is any affidavit of justification necessary until the solvency of the surety is questioned.

In the case of bonds for carrying a case to the Court of appeal, an affidavit of justification is necessary under the Order of Court of Error and Appeal, No. 8.

A bond for security for costs need not be by two sureties unless the defendant, before the bond is prepared, gives notice that he requires two sureties.

A notice of motion to set aside any order or proceeding for irregularity must state the grounds of irregularity on which the applicant relies.

[March, 1872.]

Mr. *Spragge* moved to set aside a note, *pro confesso*, entered in this cause by the Deputy-Registrar at Hamil-

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(*a*) 2 Ves. sen. 464.

ton, in default it was alleged of answer, on the ground that the defendant was not called on to answer, the plaintiffs not having perfected security for costs, a bond having been filed with only one surety, and without any affidavit of execution, or affidavit of justification.

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Mr. *Duff*, contra, objected that the motion ought to have been made before the Deputy-Registrar at Hamilton, who had noted the bill *pro confesso*, and referred to *Brigham* v. *Smith* (*a*), *Beaton* v. *Boomer* (*b*). He urged the delay that had taken place in making the present motion, and that if the defendants objected to the bond filed, it was for them to have moved to set it aside, and not to have waited until the bill was noted *pro confesso*. That the notice of motion does not state what the objections to the bond are. As to the objection of the want of any affidavits of execution and justification, there is nothing in our practice to shew that any such affidavits are necessary; the forms are given in *Taylor's* Orders, but nothing is said about the necessity for such affidavits, and the inference is that they are not needed, and therefore, *prima facie*, the bond is correct until some motion has been successfully made to set it aside, for the purposes of the present motion it must be held to be correct, *Heenan* v. *Dewar*(*c*). A party is not obliged to justify,—he may, if he thinks fit, run the risk of the other side objecting successfully to his sufficiency,—if certain of his sufficiency he may elect to run that risk; the only proper question that can be now raised is as to the solvency of the surety, and upon that the other side file no evidence. Two sureties are not necessary unless the defendant requires it, and gives notice to that effect.

Argument.

Mr. *Spragge*, in reply,—It is the duty of the party filing the bond to shew it is sufficient.

(*a*) 1 Cham. R. 334. (*b*) 2 Cham. R. 89. (*c*) 3 Cham. R. 199.

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The REFEREE.—Such is the rule at law, but not here.

MR. TAYLOR, REFEREE IN CHAMBERS.—The present motion is to set aside a bond for security for costs filed with the Deputy Registrar at Hamilton, on the grounds that there is only one surety,—no affidavit of examination, and no affidavit of justification. The notice of motion also seeks to set aside the noting *pro confesso* of the bill, and to limit a time within which security should be given.

The objection is taken to the notice of motion generally, that it does not specify the ground of irregularity on which the defendant relies, and this would of course be fatal; but it is unnecessary to give effect to this objection, or to the objection taken on account of delay, because this motion must fail on other grounds.

Judgment.

The bond for security was filed, it appears, on the 23rd of February, and notice of the filing served on the same day. On the 26th, the notice that the defendant objected to the bond was served, and the present notice of motion was given on the 1st of March.

A plaintiff giving security is not bound to give two sureties, unless the defendant requires him to do so. It is said it is always prudent to do so, because if there be only one surety the plaintiff, in the event of his death or insolvency, would have to bear the expense of a fresh bond. I think the notice requiring the plaintiff to give two sureties should be given before the bond is prepared and executed, not by way of objection after the filing of the bond, as in the present case. It does not appear that the plaintiff here followed the course laid down in *Ayckbourn's* Practice as the proper one of giving the defendant the name and residence of the proposed surety, and then waiting two days to see if any objection was made before preparing the bond. Had he

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done so, it is probable that the defendant would have given notice of his desire to have two sureties; but even had he done so, it is questionable whether the plaintiff would have been bound to comply with it. The defendant obtained the order for security, *ex parte*, in the usual way, and by that order he allowed the defendant the option of giving one surety or two,—the order requiring him to produce "some competent person or persons" to give security, &c.

That there is no affidavit of execution annexed to the bond does not seem to render it defective. Such an affidavit is no part of the bond, and none of the books of practice say anything as to its being required; and none of the books of forms, though giving forms of the bond, give any form of such an affidavit. Mr. *Ayckbourn*, who gives throughout his work on practice practical directions as to how different proceedings should be taken, (*a*) says, "The bond having been prepared and signed, and duly stamped, it is then handed to the Clerk of Records and Writs, in whose division the suit may be, by whom it is filed."

Judgment.

It is quite certain that no affidavit of justification by the surety is necessary. In the case of bonds, on carrying a case to the Court of Error and Appeal, such an affidavit is required, but it is so by an express order of Court (*b*). It is only where the surety is objected to as insolvent that an affidavit from him becomes material. Where such an objection is taken the plaintiff must, it is said, either propose another person, or the person already offered must jusify by affidavit in double the sum for which he is bound (*c*).

I do not think the plaintiff was bound to wait two days after filing the bond, and giving notice before noting the

(*a*) Ayckbourn's Pr. 428. (*b*) Ords. Ct. of E. & Ap. No. 8.
(*c*) Danl. Pr. 35.

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bill *pro. con.* if the twenty-eight days allowed the defendant for answering had expired, irrespective of the time during which proceedings were stayed pending the filing of the bond. It is true the defendant has two days after receiving notice of the bond being filed within which to object to it, and should his objections be successful the noting *pro con.* by the plaintiff would, of course, fall to the ground. But if the plaintiff being entitled to note the bill *pro con.* chooses to do so, and runs the risk of his bond being successfully objected to, I see nothing to prevent his doing so. The order of Court (*a*) on the subject clearly implies this, and if a defendant entitled to security for costs chooses to lie by until his time for answering has almost expired before taking out his order for security, he cannot complain if the plaintiff notes the bill promptly upon the security being completed. The motion must be refused with costs.

Judgment.

Though I have not disposed of it upon the technical grounds taken by the plaintiff's solicitor, there is one of them to which I may allude. He urged that the application should have been to the Master at Hamilton, citing as authority for this, *Brigham* v. *Smith* (*b*), decided by the late Chancellor. His Lordship did not in that case decide that such an application *must* be made to the Master at the place where the bill is filed; he simply said that such a course is desirable. Now Order 35 only says that local Masters "may hear or dispose of" certain applications. The next Order uses similar language, and says that certain orders drawn up by the Registrar "may be drawn up by Deputy-Registrars;" yet in *Dougall* v. *Wilburn* (*c*) though his Lordship refused to direct the Registrar to issue an order, which it was within the jurisdiction of a Deputy-Registrar to issue, he would not say that such an order,

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(*a*) Con. Gen. Ord. 409. (*b*) 1 Cham. R. 334.
(*c*) 1 Cham. R. 155.

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if issued by the Registrar, would be absolutely wrong. That such an order so issued would not have been wrong is evident from the fact, that the Court seeing the inconvenience which might result from such a practice, passed an order (*a*) for the purpose of rendering it imperative to issue them from the office of the Deputy-Registrar. I could not hold that such an application as the present must be made to the local Master, unless prepared also to hold that where a bill is filed in an outer office, applications for the appointment of guardians and for any of the other purposes mentioned in General Order 35, must also be made to him. I am not prepared to do this.

Judgment.

McNab v. McInnis.

Changing reference.

A plaintiff is entitled *prima facie* to have the reference to the Master who resides in the county in which the bill is filed; but this *prima facie* right may be rebutted by shewing sufficient grounds for the Court directing the reference to the Master at some other place.

Where an application of this kind is rested on the ground of expense, the difference in expense must in general be considerable; and where the application is rested on the ground of convenience, a slight or doubtful balance of convenience is not sufficient to deprive the plaintiff of his *prima facie* right; a reasonably clear case of preponderating convenience must be established by the defendant.

A man in extensive business, or a trustee, is not entitled, when a defendant, to have the reference to such place as suits him best, if there is no other strong ground for the change from the place selected by the plaintiff.

[March, 1872.]

This was an application on the part of the defendant to change the reference to Hamilton.

(*a*) Gen. Ord. 595.

1872.

McNab v. McInnis.

The suit was by an infant of eight years old, who sued by her grandfather as her next friend. She was the *cestui que* trust under a deed of trust, dated the 1st of March, 1865, and made between her late father, a merchant at Chatham, of the first part, and the defendant, a merchant of Hamilton, of the second part. The settlor was in bad health at the time of executing the deed; and that was recited as the occasion of the deed. He died a few days after executing it. The effect of the instrument was, to transfer to the defendant (a creditor) all the settlor's stock in trade, debts and other property, in trust to realize the same, to pay all the settlor's liabilities, and to hold the surplus in trust for the settlor while living, and for the plaintiff on the settlor's death, subject to any provisions on the subject which his last will should contain. He had previously made a will, dated the 23rd of June, 1864, whereby he had given everything to the plaintiff, and had appointed executors, who proved the will after his death.

Statement.

On the case coming on to be heard, the defendant agreed to the decree being as asked; and the only question raised was, as to the place to which the reference should be directed. The bill was filed at Brampton, near which place the next friend resided; and he desired a reference to Brampton. He now was willing that the reference should be to Toronto, where the bill laid the venue, and which place, it was admitted, would be considerably more convenient to the defendant and his witnesses than Brampton would; but the defendant claimed that the reference should be to Hamilton instead of either place.

The defendant stated several circumstances as affording special grounds for the reference to Hamilton. He stated that he was largely engaged in business in Hamilton; that he was a member of two firms there; that the entries relating to the management and winding up

of the estate had been made chiefly in the books of one of these firms, and extended from 1865 to the present time; that it was necessary and expedient for him, as he was advised and believed, to produce and use these books on the reference; that their removal from Hamilton even for a day would cause serious inconvenience and, probably, loss to the firm; that it would be necessary for him to attend as a witness on his own behalf, and also for one or more of his clerks to attend likewise; that their absence from Hamilton would occasion serious inconvenience and loss to his firms, and increased expense (the fare from Hamilton to Brampton being about $2 and the route being from Hamilton to Toronto by Great Western Railway, and thence by Grand Trunk Railway); that he would need to bring one witness, and probably more, from Chatham, and perhaps one from Montreal; that he believed these would be his only witnesses; and that he did not know of any witnesses whom the plaintiff could have except persons residing in Chatham and Hamilton. On the other hand, the plaintiff's next friend swore that he was a necessary witness for the plaintiff, and that he had another witness who resided in the same neighbourhood.

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Mr. *Moss* appeared for the defendant.

Mr. *G. Morphy*, contra.

MOWAT, V. C.—In *Macara* v. *Gwynne* (*a*), the general rule on this subject was declared to be, that a plaintiff is entitled *prima facie* to have the reference to the Master who resides in the county in which the bill is filed; but that this *prima facie* right might be rebutted by shewing sufficient grounds for the Court interposing, and directing the reference to the Master at some other place. That, I apprehend, is still recognized

Judgment.

(*a*) 3 Gr. 310.

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as the correct rule. It was said that the current of decision since had opposed the rule; but that is not so. The subsequent cases bear on the question only whether the rule would now be held applicable to the facts which appeared in the case cited. The onus, therefore, is on the present defendant of shewing sufficient special grounds for sending the reference to Hamilton rather than to Toronto.

It is to be observed, that the trust was not created in Hamilton, but at Chatham; that the settlor resided in Chatham; that his business was carried on there; that his assets were there; that the debts due to him were from persons in that neighbourhood; and that it was there that the assets were afterwards collected and turned into money. The principal matters transacted at Hamilton appear to have been the application and investment of the trust money after it had been received; and the affidavits do not shew that these matters involve numerous transactions, or that the defendant expects that they will give rise to any contested questions of fact.

Judgment.

The defendant's witnesses appear to be few; and the difference in expense between the reference being to Hamilton and being to Toronto, so far as the affidavits enable me to judge, would be trifling; nor between Hamilton and even Brampton would the difference of expense appear to be great.

As to the convenience of witnesses, the difference to the Chatham witnesses would be, travelling by railway seven hours to Toronto, instead of five hours to Hamilton. The defendant is not sure that he will have occasion for more than one witness from Chatham; and the saving to that witness by stopping at Hamilton is counterbalanced by the increased distance which the Montreal witness would in that case have to travel.

The books of the firm are not evidence for the defendant; and, in the circumstances which he states, production of the books at Hamilton would probably be the most that, under the practice of the Court, could be required on the plaintiff's behalf, even though the reference should be to a Master elsewhere. Besides, the circumstance of the defendant having chosen to keep the accounts of the estate in these books ought not to give him any advantage in selecting the place of trial.

Where an application of this kind is rested on the ground of expense, the difference ought in general to be considerable; and where the application is rested on the ground of convenience, a slight or doubtful balance of convenience is not sufficient to deprive the plaintiff of his *prima facie* right; a reasonably clear case of preponderating convenience has to be established by the defendant; and I do not see that the defendant has made out such a case—unless what he says of the convenience to himself personally can be so regarded. Now I cannot hold that either a man in extensive business or a trustee, is entitled, when a defendant, to have the reference to such place as suits him best, if there is no other strong ground for the change from the place selected by the plaintiff; and, though the circumstance of the position which the defendant occupies is not to be put out of consideration, yet much less weight is to be ascribed to it than might be proper where the trust was created, and the original estate lay, in the place where the trustee resides, and to which he desires the reference to be changed; and, against such weight as the plaintiff's position is under all the circumstances entitled to in the present case, I must not forget that, if Hamilton would be more convenient for him, it would be less convenient for those who represent the interests of the infant; and the interests of infants need the special protection of the Court.

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It is to be observed, also, that the defendant will get all his reasonable costs, charges and expenses, if his management of the trust be proved to have been correct; and, if the expense of a reference to Toronto may, on the whole, be greater to the plaintiff's estate than a reference to Hamilton, the plaintiff's grandfather and next friend has been advised that it will be in her interest to incur or run the risk of incurring such increased expense; and I cannot say that I have any sufficient reason for thinking the advice to be an error.

On the whole, I think that the defendant has not made out a sufficiently strong case for a reference to Hamilton. The reference, therefore, will be to Toronto; and the defendant must pay the costs of the present application.

Judgment.

Re Howland.

Quieting Titles Act.

The Court, or a Judge thereof, is empowered, by the 21st section of the Quieting Titles Act, to refer a disputed question to an expert, and considering him as an assessor assisting the Court with his judgment, will act on his finding, unless it is clearly established that the finding is erroneous.

On an appeal from a report of the Accountant, when Referee of Titles, the Judge who heard the appeal directed that it be referred to a surveyor, to enquire and report whether the description in a certain conveyance did, or did not, include the land in dispute. The Referee had found that it did, and the surveyor's report confirmed the Referee's finding. The Judge thereupon adopted the surveyor's report, and dismissed the appeal with costs.

[Strong, V.C., on appeal from the Referee, 19th May, 1872.]

Mr. *Christopher Patterson* and Mr. *J. C. Hamilton*, for the appellants.

Mr. *Fitzgerald* and Mr. *A. Hoskin*, for the respondents.

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Re Howland.

STRONG, V. C.—This is a proceeding under the Act for Quieting Titles. The petitioner's claim is contested by *Charlotte Eliza Perry* and *Daniel Perry*, and evidence was gone into on each side before the Accountant, when Referee, was reported in favor of the petitioners. From this report there was an appeal, and on the appeal coming on before me on the 13th of October last, finding that the question in controversy depended altogether as to whether, or not, the piece of land in dispute was included within the boundaries described in a certain conveyance dated the 19th of March, 1827, from *William Cooper* to *Thomas Cooper*, under which the petitioners claim, I made an order referring it to a surveyor to enquire and report whether the description in this conveyance did, or did not, include the land in dispute, as the Referee, acting on the evidence of surveyors called as witnesses, had already found that it did. I made this reference in pursuance of the powers conferred by section twenty-one of the Quieting Titles Act, (and see Order number 541 of the Consolidated Orders of this Court,) and after consulting my brother *Mowat*, who informed me that he had made similar orders. The material part of the description in the conveyance of the 19th of March, 1827, is as follows: "Thence along Dundas Street, north fifty-five degrees east, two chains eighteen links to a black oak tree; thence, continuing the said course to the western edge of the river Humber, three chains more or less; thence northerly and westerly against the stream to a distance that shall leave one chain for the allowance of Dundas Street; thence south fifty-five degrees west, along the north side of Dundas Street four chains more or less *to where the said line will intersect a line produced from the black oak tree on a course of north eighty-two degrees west; thence continuing the said course seven chains sixty links to where a post has been planted on the edge of the second bank; thence north seventy-seven degrees fifteen minutes west, five chains fifty links to a Norway pine*

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1872. *tree near the edge of the bank.*" The question is, as to
Re Howland. the proper course of the two last mentioned distances in this description, those of seven chains and sixty links, and five chains and fifty links. All vestiges of the black oak tree and of the post planted on the edge of the bank have disappeared, and their positions cannot be fixed by evidence with sufficient certainty. But the Norway pine tree either remains, or its site can be accurately fixed.

In this state of things the natural landmark at which the lines in dispute originally commenced, being obliterated, whilst that at which they terminated remains; the obvious course would seem to have been, to begin at the Norway pine tree, and reversing the courses run the lines backwards, that is to say, measure a distance of five chains and fifty links on a course south seventy-seven degrees eighteen minutes east, and then a dis-
Judgment. tance of seven chains and sixty links on a course south eighty-two degrees east. This is exactly what the surveyor reports he has done; and he finds the piece of land in dispute on the petitioners' side of the lines he has so run. This result coincides with the evidence before the Accountant, especially with that of Mr. *John S. Dennis*, a surveyor who was called by the petitioners, and is in accordance with the result of an action of ejectment tried some years ago between the petitioners' grantor and Mr. *Gamble*, and is moreover confirmed by the strong corroborative evidence of possession which is always most material when a question of fact has to be determined as in the present case, with the aid of that species of evidence known as conveyancer's evidence, which the ninth section of the Act expressly declares shall be admissible in these inquiries. The contestants however require that I should disregard all this and set aside the report of the surveyor for two reasons, first, because the original survey for the purpose of the description in the deed of 1827 was a magnetic

survey, and there is, as Mr. *Gibson*, the surveyor, states in his report, a variation in the compass, from year to year, and secondly because *Falls*, a witness for the contestants, states that in 1836 he put up a fence upon what *Thomas Cooper*, who at that time had not conveyed to the plaintiff's grantor, indicated was the true line, and which does not agree with the lines now determined by Mr. *Gibson*, the surveyor, but would contain the piece of land in dispute on the contestant's side. 1872. Re Howland.

As to the first objection it is impossible that I could on that, disregard the report of the surveyor who is not open to be considered as a witness giving evidence, but as an assessor assisting the Court with his judgment. He certifies, that making due allowance for the variation of the compass, he had fixed the lines run upon the backward course, in the manner shewn upon the plan accompanying his report. I must either take this as conclusive, or else, I must go to the length of saying that these magnetic courses were so uncertain by reason of the variation in the compass as to be of no service whatever in the case which has happened, of the landmarks being lost. These lines now determined may not be strictly accurate, but the parties to the conveyance in which they are first found, and under whom the parties respectively derive title must be taken to have agreed to be governed by them in case resort to them should be rendered necessary. Then all that the Court can do is, to determine these boundaries with the assistance of an expert by the mode I have adopted. Judgment.

As to the argument founded on the old fence, all that I need do to shew the futility of that is to refer to the deposition of *Falls* the witness on whose evidence it rests. He says, " when Mr. *Cooper* shewed me the line, I don't think there was anything along it which would enable him to designate the course of it." And again, " Mr. *Cooper* staid about an hour at the time when he

1872. pointed out the line. Mr. *Cooper* had no instrument
Re Howland. with him to set out the line, nor any documents shewing it. The stepping out of the line, was not stopped by any impediment whatever—building, road, or anything else—and I can't say whether *Cooper* or I stepped it."

Upon this evidence, how could I possibly reject the opinion of the assessor to whom the question of survey has been left What I take this witness to establish is merely this: that being about to put up the fence, Mr. *Cooper* pointed out to him a line which he considered to approximate to the boundary. That this was not in fact the true line, if the position of the fence, which
Judgment. has long since disappeared, is correctly pointed out by *Falls*, is not now demonstrated for the first time, for the contrary was established a number of years ago in the action of ejectment, and the possession has ever since been according to the result of that action.

I think I have no alternative but to adopt the surveyor's report which confirms that of the Referee. Were I to overturn their reports, I could adopt no other course than to refer the question to some other surveyor; and I have no right to suppose that his opinion would be entitled to more weight than that of Mr. *Gibson*, who was chosen without objection from either party. Then the contestants having failed to establish that the Referee's report is erroneous, I must dismiss their appeal with costs.

WEBB v. MCARTHUR.

1872.

Webb v. McArthur.

Dismissing bill—Set off of costs.

A bill had been filed for an injunction to stay an action of ejectment, which action the plaintiff having successfully defended before any injunction could be obtained, he proceeded no further with his suit in equity. Upon the application of the defendant the bill was dismissed with costs.

It was claimed that the costs at law should be set off as against these costs, but the Referee considered that the rule in England should be followed here, viz: that costs at law could not be set off against costs in equity.

STRONG, V. C., affirmed the order of the Referee as to the dismissal of the bill with costs, and, without expressing any opinion as to whether costs at law could be set off against costs in equity in a proper case affirmed the order of the Referee on this point also, on the ground that in this case of the lien of the attorney-at-law attached, and was paramount to any right set off.

[CHAMBERS, April, 1872.]

Mr. *Foster*, for the defendant, moved to dismiss the bill for want of prosecution. On the motion coming on the plaintiff's solicitor asked leave to serve a notice of motion to dismiss the bill without costs, and that the defendant's motion should stand over and come on at the same time. The defendant's solicitor consented to the question of whether the dismissal should be with or without costs, being argued as if notice had been served by the plaintiff.

Mr. *Arnoldi*, for the plaintiff.

MR. TAYLOR, REFEREE IN CHAMBERS.—As no opposition is made to the bill being dismissed, the only question I have to consider is, whether the order should be with or without costs. Judgment.

The suit was brought for the purpose of obtaining an injunction to stay an action of ejectment, which however was tried before an injunction could be obtained. In the action at law the defendant (the plaintiff in this suit, succeeded, so the filing of the bill was so far

1872. an unnecessary proceeding. It is said however, that
Webb there was another reason for the bill being filed,
v. McArthur. namely, that the action of ejectment being the second proceeding taken by the defendant to have relief against the deed under which the plaintiff claims; the plaintiff could maintain a suit for a perpetual injunction to stay the vexatious proceedings of the defendant. The bill was framed with a view to this relief as well as to stay the particular action of ejectment. I do not see how this is any ground for relieving the plaintiff from paying costs. Had they really stood in need of such relief or desired it, why have they not prosecuted the suit. Their title to such relief if they have any would be stronger now than when the bill was filed. At the date of filing the bill, a suit in this Court instituted by the defendant in respect of the property in question had been dismissed, the learned Chancellor leaving the de-
Judgment. fendant the then plaintiff to any remedy he might have at law, and an action at law had been commenced. This action has now terminated adversely to the defendant so that the plaintiffs have now established their right both at law and in equity. The plaintiffs having succeeded at law shews that as to so much of the relief sought by their bill proceedings in this Court were not necessary, and having declined to prosecute the suit for the purpose of obtaining the former relief to which they lay claim, the bill should be dismissed with costs.

The costs of the action at law have not been paid, it is said, and I was asked if I gave the defendant costs here to order them to be set off against these costs in law. The practice in England is not to set off costs in equity against costs at law, and no case was cited to shew that a different practice prevails here.

The tenants, who were defendants to the action at law, having assigned their clain for costs to the trustees who are the plaintiffs in this suit, the costs are

now due between the same parties, and this was assigned as a reason for allowing the set-off. Reference was made in connection with this to the Act of last session (35 Vic. c. 12) respecting the assignment of debts and choses in action. That Act has, however, no bearing on the question that I can see. That Act does not say that the assignment of a debt shall enable a set-off to be made when it could not be made before the assignment, but that an assignment of a debt or chose in action shall be subject to any defence or set off which existed at the time of, or before notice of the assignment. In other words, it provides that an assignment is not to defeat a right of set-off.

From this decision the plaintiff appealed.

Mr. *Arnoldi*, for the appeal, contended that his cross-motion to dismiss without costs ought to have been granted, inasmuch as the subject matter of the suit was gone, and he cited *Webster* v. *Webster* (*a*), *Pinfold* v. *Pinfold* (*b*), *Wright* v. *Barlow* (*c*), *Taylor's* Orders, page 263. Or, if the bill was dismissed with costs, then such costs should be set off against the costs of the action of ejectment. The Referee had hesitated to make a precedent by setting off costs at law against costs in equity, but such is the course in England, and the same course had been adopted here; in a case at Woodstock the Chancellor had, he said, made such an order a term of the decree. In the cases in England where it has been refused, there had been an intervening lien of the attorney, and in the absence of any reciprocity the rule could not be applied. It is true Mr. *Daniell* in his work says such a set-off cannot be had, but the cases he cites do not support his text. He referred also to *Marquis of Salisbury* v. *McGuire* (*d*). Statement.

(*a*) 3 Jur. N. S. 655.
(*b*) 16 Jurist, 1081.
(*c*) 5 DeG. & Smale, 43.
(*d*) 7 Ir. Eq. 499.

1872.
Webb v. McArthur.

Mr. *Foster*, for the respondent. The object of the bill was to restrain proceedings at law alleged to be vexatious, but the object of the suit has been attained at law, the defendant at law having succeeded and the bill is thus shown to have been unnecessarily filed. Any motion to dismiss it must be with costs, the plaintiffs in the bill have abandoned proceedings in this Court and thus admitted that the remedy was at law, here the plaintiff seeks to dismiss her own bill, and must pay the costs of the defendant. If the costs were given in this case they could be claimed in every case where a plaintiff had sought a remedy in other Courts: *Salisbury* v. *McGuire* is not authority here. The question of the Solicitor's lien intervening is the ground for refusal in the English cases, and the same rule is applicable here. He objected also that such a motion as the present could not properly be entertained in Chambers, and cited *Collett* v. *Preston* (*a*), *Morgan & Davy*, 93.

Judgment.

Mr. *Arnoldi*, in reply. *Morgan & Davy*, 397, and the cases cited there shew that a solicitor's lien will not be allowed to interfere with the right of set-off: see *Gwynn* v. *Krous* (*b*). Here the plaintiff is not asking for costs, but merely to have her bill dismissed without costs. It was not known that the suit in ejectment would terminate in her favor; and as she considered she had a right to stay the proceedings at law, it was only a prudent course to file the bill and avail herself of both grounds. In *Webster* v. *Webster* cited above the plaintiff was entitled to file a bill, yet it was considered inconvenient to make him proceed with the suit, and he was allowed to dismiss it without costs. He referred also to *Wilson* v. *Switzer* (*c*).

STRONG, V. C.—I see no grounds for differing from the conclusions arrived at by the Referee.

The plaintiffs had a good legal defence to the action

(*a*) 15 Beav. 458. (*b*) 7 Ir. Eq. 174. (*c*) 1 Cham. R. 75.

which they successfully availed themselves of at law. There was therefore no necessity for resorting to this Court to have the action restrained on equitable grounds at all events not until the legal defence had failed. Morover the equity of the plaintiff's bill may, for all that appears to the contrary, be entirely unfounded in point of fact, for I cannot say that the alleged agreement that the separation deed should not be affected by the subsequent cohabitation has ever been proved.

With regard to the question of set off, the case of *Collett* v. *Preston* (*a*) is a conclusive authority for defendant, and must prevail against the case of *Marquis of Salisbury* v. *McGuire* (*b*) and *Shine* v. *Gough* (*c*) which appear to be the other way, though the grounds of the judgment in the first mentioned case are not given in the report. The principle of the decision in *Collett* v. *Preston* was that to permit the set-off would be to interfere with the solicitor's lien, and it is for this reason that I affirm the order now appealed from, for I cannot in the face of the decision of the Master of the Rolls say that this Court will deal with the right to set-off as being paramount to the lien. That the attorney-at-law has in point of fact a lien for his costs I think I must assume, as it has not been shewn that his costs have been paid by his client, but as this has not even been asserted I should have no hesitation in allowing an affidavit of that fact now to be filed. I proceed entirely on the ground of the lien, and I express no opinion as to the right to set off costs at law against costs in equity in a case where it clearly appears that there is no lien to be prejudiced.

Judgment.

Order affirmed with costs.

(*a*) 15 Beav. 458. (*b*) 7 Ir. Eq. 499. (*c*) 2 B. & B. 33.

1872.

R. C. Bank v. Dennis.

Royal Canadian Bank v. Dennis.

Sale—Master's directions not followed.

When a sale has been held and the Master's directions have not been followed, the vendor will have to shew, at his own expense, that no person interested had been injured by the non-observance of the directions; otherwise the Master will not confirm the sale.

[Master's Office, April 19th, 1872.]

In this case the property had not been advertised as directed by the Master. After the sale took place the Master was asked to report upon it.

Mr. Boyd, Master in Ordinary.—It is the duty of the Master to investigate whether he can approve of this sale, the directions as to advertising not having been followed. A case will have to be made by the vendor on affidavit or other evidence sufficient to shew *prima facie* that no detriment has resulted to any person interested from the omission to advertise as directed, upon which a warrant will issue calling on defendant and other persons (if any) interested in the proceeds of the sale to show cause why the Master should not approve of the sale. This will be personally served, if the bill is *pro confesso*, and underwritten: "The plaintiff not having complied with the Master's directions as to advertising the property sold herein, to shew cause why such sale should not be approved of by the Master. Upon the return of this warrant the affidavit of——, now filed in the Master's office, will be read by the plaintiff."

Judgment.

Upon the return of the warrant the Master will determine upon what report to make. These proceedings must, of course, be had at the vendor's own expense. The suit is not to be burdened therewith.

Re S. S. McDonnell.

1872.

Re McDonnell.

Proceeding on Master's warrant—Costs of day.

The Master will proceed upon his warrant, though the order of reference be obtained *ex parte* and be not served, so long as the warrant is not moved against.

As to when costs of day will be granted.

[Master's Office, May, 1872.

Mr. Boyd, Master in Ordinary.—The Master will not look behind his own warrant and direction, that being based upon an order of reference; so long as the direction stands, the party is "bound" to comply with it. If a party fails to comply with the warrant, and in consequence an adjournment is occasioned by his conduct, or asked for by him, as in the present case, in order to comply with the warrant, the General Orders give the Master power over the costs, and in such cases I think, the party in default should pay the costs of the day to the other side—provided always that he has had sufficient time and opportunity to comply with the warrant. It is said here that the solicitor had not a proper opportunity to comply with the warrant which directs the solicitor to bring an account under oath of his receipts and payments as in the order mentioned, because the order to refer and tax being *ex parte*, should have been, but was not, served upon the solicitor, either before or with the copy of the warrant served. Now, I rather think that the client is not bound to serve this order until he seeks directly to compel the solicitor to take some step, or do or restrain from doing some act referred to in it. The order being brought into the Master's office is operative though not served (*a*). If the solicitor did not know what account he was to bring in, the means of ascertainment were easily within his reach—either by demanding a copy of the order, or attending to examine it as brought into the Master's office. But this question does not really arise here. The

Judgment.

(*a*) Church v. March, 2 Ha. 652.

1872. solicitor asked as a favour to have further time to bring in his account, the client being ready to proceed and being prepared to waive any account. The rule laid down in *Re Dendy* (*a*) applies, and the solicitor should pay costs of day as the price of the indulgence (*b*).

Re McDonnell.

FULLER v. PARNALL.

Usury—Appropriation of payments.

A mortgage securing ten per cent. made after the Statute 16 Vic. c. 80, and before 22 Vict. c. 85 cannot be enforced for more than six per cent., though as to payments made without appropriation the mortgagee may appropriate the money to the satisfaction of the usurious interest before coming into Court.

In part payment of the usurious mortgage, another mortgage of a third party had been assigned, which had not fallen due.

Held, that the amount of the mortgage could not be applied by anticipation to the payment of usurious interest not due.

[MASTER'S OFFICE, 1872.]

MR. BOYD, MASTER IN ORDINARY.—The law upon the Canadian statutes of usury is conclusively laid down in the judgment of the Court of Error and Appeal, in *Quinlan* v. *Gordon* (*c*) (which, strange to say, is nowhere else reported.) From this case it appears that *Stimson* v. *Kerby* (*d*), relied upon by the defendants, is overruled.

Judgment.

The mortgage in the present case was made during the period between the 24th of March, 1853, and the 16th of August, 1858, and is drawn for ten per cent. interest.

If interest in excess of six per cent. has been paid by the defendant he cannot get the benefit of that excess. The test is whether an action for money had and received would lie therefor; and this the Court of Appeal answers in the negative. They hold in effect

(*a*) 21 Beav. 565.
(*b*) See Orders 296, 215, 217, 231.
(*c*) 7 U. C. L. J. 232.
(*d*) 7 Grant, 510.

1872.

Fuller v. Parnall.

that since the Provincial statute 16 Victoriæ, chapter 80, the voluntary payment of any amount of interest by the borrower is legalized, and the lender may retain the amount, although this statute prohibits the lender from enforcing, through the medium of a Court more than six per cent. They put the excess upon the same footing as cases under the English statute prohibiting any action being brought for a debt due for small quantities of spirituous liquors.

The plaintiff had the right to appropriate the payments, if made by the debtor without appropriation to the payment of the ten per cent. interest as far as they would go, and in the account brought in he has so applied the moneys, and I shall not disturb his account in this respect down to the 10th of July, 1870. I am justified in this by the holding in cases relating to spirituous liquors of the kind referred to by the Court of Error and Appeal (*a*).

Judgment.

As to $400 balance not yet paid of *May's* mortgage, the plaintiff cannot by anticipation apply this to the excessive interest and forestall the debtor's right to apply it. It stands now as a credit which the Court is to appropriate, and this I do to satisfy the balance of interest at six per cent. due on the 10th of July, and the rest in reduction of the principal money—on which thereafter only six per cent. can be allowed.

Re Rundel.

Quieting Titles Act.

In proceeding under the Quieting Titles Act, although it is not imperative that the affidavit in proof of title, should be made by the petitioner, some valid reasons should be given why it is not so made when such is the case.

(*a*) See Cruickshank v. Rose, 1 M. & Rob. 100; and Philpott v. Jones, 2 A. & E. 41.

1872.

Re Rundel.

Where the title had passed through the hands of a trustee to pay creditors, notice was required to be given to the trustee, and an advertisement was directed to be published, calling on the creditors to shew cause why a certificate should not issue.

It is necessary that a certificate from the sheriff as to executions against the petitioner, be produced.

[Mr. Taylor, 1872.]

Mr. Taylor, Referee in Chambers.—No affidavit has been made by the petitioner who became the purchaser of the land in question in November, 1871. Instead of his affidavit, one is produced made by the person from whom he purchased. In this affidavit the deponent says, that when he sold and conveyed the land to the petitioner, he was the absolute owner in fee simple, and that he sold and conveyed it to the petitioner absolutely free from all encumbrances. He then, after saying, "I am better acquainted with the title to the said lot than the said *William Rundel*, who is not acquainted with the said title," goes on to make the affidavit in the usual form required from a petitioner (*a*). No other reason for the petitioner's affidavit being dispensed with is given.

Judgment.

It is not essential that the affidavit or deposition should be made by the petitioner, the statute (*b*), containing a provision that it may in a proper case be dispensed with, or may be made by some other person instead of the person whose title is to be investigated. The reason assigned in the present case for dispensing with the petitioners affidavit is not sufficient. Though it is only a few months since the petitioner purchased the property there may be defects, arising since he became the owner, of which the grantor knows nothing, or he may have purchased not as the absolute owner, but as trustee for some person, and the Court is entitled to have his own oath pledged to the fact of his being the absolute owner, and that he is not aware

(*a*) Taylor on Titles, 169. (*b*) 29 Vic. ch. 25, sec. 7.

of any defects in the title, or of any charges or incumbrances on the property. An affidavit from the petitioner must therefore be supplied. 1872. Re Rundel.

It appears that *Alexander Dalziel*, a former owner in 1859, executed an assignment for the benefit of creditors conveying this piece of land in question with other property, to *John Dalziel* as trustee. The trust for the creditors appears to have been carried out thus: The assignor and assignee joined in a conveyance of the land to one *Watson*, subject to certain mortgages and registered judgments, and the creditors were, it is alleged, paid off by *Watson*. As *John Dalziel* accepted the trusts, notice should be given to him or a consent from him obtained. If any of the creditors are not paid he may be liable to them. Some evidence of the creditors being paid, is given here, but an advertisement should also be published, calling upon any creditors of *Alexander Dalziel* entitled to the benefit of the trust deed to come in by a day to be named in the advertisement, and shew cause, if so advised, why a certificate of title should not issue to the petitioner concluding in the usual way, that in default of their doing so, any claims they may have will be barred, and the title of the petitioner become absolute at law and in equity, subject to the usual exceptions. Judgment.

No certificate from the sheriff as to executions against the parties is produced. There is a certificate as to executions against the person from whom he purchased, and this is proper, the conveyance from him to the petitioner having been made within two years before the filing of the petition (*a*). The production of such a certificate cannot, however, render it unnecessary to produce one as to executions against the petitioner also.

Mr. Hardy, Solicitor for Petitioner.

(*a*) Re Lyons, 2 Cham. R. 357; Re Harding, 3 Cham. R. 232.

1872.

Re Howland.

RE HOWLAND.

Quieting Titles Act (29 *Vict. c.* 25)— *Security for costs—Married woman—Next friend.*

The Referee having found against two parties, a husband and wife, who had each been contestants in an investigation under the Quieting Titles Act, they appealed and the appeal was dismissed with costs. They afterwards applied, under sec. 42 of the Act, to have a re-investigation of the title. Upon an application by the original petitioner proceedings were stayed until the costs of the appeal were paid, and security given for costs of the present proceedings: and until a next friend was appointed for the married woman contestant.

The Court will in the interests of justice, exercise a liberal discretion in extending the time for appealing, or reinvestigating a title, where any error is alleged to exist. Where, therefore, it appeared that the contestants had been somewhat misled as to a separate piece of land to which they supposed no claim to be asserted, the Court granted an application for a reinvestigation of the title after the time for applying had expired, on payment of costs.

[MR. TAYLOR, April 24th, 1872.]
[STRONG, V. C., May 13th, 1872.]

Statement. This was a proceeding under the Act for Quieting Titles in which *Daniel Perry* and wife were brought before the Court as contestants; *Perry* laying claim to one portion of the property in question and his wife claiming another portion in her own right. The Referee found against the contestants, and from his finding they appealed, serving separate notices of appeal. Both appeals were dismissed with costs and a certificate of title issued to the original petitioner in due course. *Perry* and wife presented a joint petition under the 42nd section of the Act praying that the title might be reinvestigated, and this petition had been served and set down for hearing. The costs of the appeal by Mrs. *Perry* had been paid but those awarded on the appeal of *Daniel Perry* had not, and an execution issued to enforce payment had been returned *nulla bona*.

1872.

Re Howland.

The original petitioners now applied to stay proceedings on the petition for reinvestigation, and to strike the petition out of the paper on the ground as to *Perry* that the former costs were not paid, and as to Mrs. *Perry* on the ground that no next friend has been named for her.

Statement.

Mr. *Arnoldi*, for the application. Great delay had, he urged, already taken place in the proceedings. The petitioners had been found entitled to the whole of the land, and this decision had been sustained on appeal. A party in such a position cannot institute new proceedings without paying the costs of the past proceedings; the Statute says, "a former suit or proceeding" In any event a married woman must appear by next friend, and give security for costs. The Quieting Titles Act says, it is true, (sec. 41), that a married woman shall be treated as a *feme sole;* but the present application is not strictly an application under that Act: he referred to *Butler* v. *Church* (*a*): *Blackburn* v. *McKinlay* (*b*); *Follis* v. *Todd* (*c*).

Mr. *Hamilton*, contra, contended that the petition and application were properly a proceeding under the Quieting Titles Act, and were authorized by the 42nd section of the Act, being brought "to remedy an error" in a former proceeding. His clients had been the contestants in the former proceedings, and where parties are brought into Court at the instance of others, they are not obliged to give security for costs.

Judgment.

Mr. Taylor, Referee in Chambers.—A number of points urged by the solicitor for the applicants as to the delay in presenting the petition, and as to the 42nd section of the Act not being applicable to the case of a contestant who has had already an opportunity

(*a*) 16 Grant 205. (*b*) 3 Cham. R. 65. (*c*) 1 Cham. R. 288.

1874. Re Howland. of investigating the petitioners' title, I leave for the judgment of the Court when the petition comes before it. The words of the section, "any party aggrieved," seem wide enough to cover such a case as the present.

If then a contestant who has already appeared can file such a petition the proceeding is analogous to a bill of review in an ordinary suit in this Court. Now the practice in a bill of review is, that the decree must be performed before such a bill can be filed. If money is directed by a decree to be paid, it ought to be paid before the bill of review is filed (*a*). It is true that in such cases the rule has been relaxed, but there has in such cases been an application for leave to file the bill without first performing the decree. Thus in *Fitton* v. *Macclesfield* (*b*) the plaintiff was allowed upon making oath that he was not worth £40 besides the matters in question to bring his bill of review without paying the costs awarded by the original decree. So in *Williams* v. *Mellish* (*c*) a party was allowed to file a bill of review on swearing that he was unable to perform the decree surrendering himself to the Fleet, to lie in prison till the matter was decided on the bill of review. In *Savil* v. *Darcey* (*d*) the rule that the decree must be performed was relaxed upon security being given. In all these cases there was an application for leave to proceed without performing the decree.

Judgment.

As to the objection that there is no next friend for Mrs. *Perry*, I think it is necessary for her to have one. This is not proceeding similar to *Hancock* v. *McIlroy* (*e*). It is a new proceeding. The provision at the end of sec. 41, "but a married woman shall, for the purposes

(*a*) Bishop of Durham v. Liddell, 2 Pro. P. C. 63.
(*b*) 1 Vern. 263. (*c*) 1 Vern. 117. (*d*) 1 Ch. Cas. 42.
(*e*) 18 Gr. 209.

of this Act, be deemed a *feme sole*," must be read as meaning for the purposes mentioned in that section, and cannot be held to warrant the taking of proceedings by a married woman on her own behalf without a next friend. The Irish Encumbered Estates Court Act contains a similar clause introduced in the same way, yet, in *Re Knox* (*a*) where a married woman presented a petition without a next friend, her solicitor was held personally liable for the costs. 1872. Re Howland.

Besides under the 22nd section security may at any time be ordered to be given by an applicant for a certificate, or by any person making an adverse claim, and it seems to me the present is just a proceeding in which security should be ordered. *Perry* and his wife have contested the petitioners' claim before the Referee, they have carried the matter to the Court, and throughout the result has been adverse to them. I therefore order proceedings to be stayed until a next friend is appointed for Mrs. *Perry*, and until security for the costs of these proceedings is given, and until the costs already incurred remaining unpaid are paid. Judgment.

The demanding the affidavits is not a waiver of the objection as to the next friend. Such an objection was allowed in *Hope* v. *Fox* (*b*) even though the defendants answered and did not take the objection until the hearing. It cannot be a waiver of the objection as to *Daniel Perry*, because the demand was served before the return of the writ. The costs of the present application will be costs in the matter to the respondents only.

From this decision the petitioners, the former contestants appealed, and the matter came on to be heard before STRONG, V. C.

(*a*) 3 Ir. Jur. 137. (*b*) 1 J. & H. 456.

1872.

Re Howland.

Mr. *C. S. Patterson*, Q.C., for the appeal. One part of our case is, that we may have leave to appeal although the six months allowed for appealing have expired. We have had thirty years' possession. When the original petition was before the Referee, Mr. *Peley Howland* expressly stated that he made no claim for a certain portion of the land, and therefore we made no case as to that, we treated it as not in question; we ask now to give evidence as to that portion, and to open the matter to that extent at least. The proceeding is in some respects similar to a bill in the nature of a bill of review, but we are ordered to pay all the costs of the contest. [THE VICE-CHANCELLOR.—Why did you not attend on the settling of the certificate, and urge your objections? It was adjourned from time to time, and every opportunity given you.] The certificate was drawn up after we had been dismissed from the case, and declared to have no interest in it, and we were not in strictness bound to be present. We apply now under the 42nd clause of the Act, and have to account for delay, which I submit we do; we cannot perhaps come in now, and obtain leave to appeal under that clause, but as a substantive application the Court can grant us leave, upon such terms as may be deemed reasonable.

Statement.

Mr. *Arnoldi*, contra. The order for security for costs was made under the section of the Act allowing security to be granted at any stage of the proceedings. The report of the Referee and the judgment covers all the ground the contestants now take, and the report includes the land they now seek to give evidence concerning. The 30th section of the Act makes the certificate conclusive. The report included the land referred to. That report was appealed from and was upheld, and it is now too late to complain of it. They attended on several occasions for the purpose of settling the certificate, and were cognizant then of the circumstances they now urge, and should have objected then. He

cited *Ostrander* v. *Ostrander* (*a*), *Urlin* and *Keys* Land Acts (*b*), *Bishop of Durham* v. *Liddell* (*c*). 1872. Re Howland.

Mr. *Patterson*, in reply. Section 42 merely applies to the terms on which the prayer of our petition may be granted. What we ask now is merely leave to come in; it does not come up now on what terms we are to have the relief we seek.

STRONG, V.C.—The Referee has a discretion under the 42nd section of the Quieting Titles Act: that section expressly authorizing the Court to impose terms if it thinks just. The Referee assumed the case to be similar to that of a bill of review, in which costs are always paid; a very proper practice to be followed. The 32nd section of the Act enables the Referee to exercise a discretion; 22nd section does not apply only to cases where a party is out of the jurisdiction. Where the husband of a married woman suitor is insolvent, it is right to impose terms, I therefore affirm the decision of the Referee, with costs. As to the other part of the case, the application for leave to appeal, or rather for a reinvestigation of the title, although I consider the contestants ought to have attended and urged any objections they had on the settling of the certificate, yet in matters of this nature a great deal of latitude is allowed, and it seems to have been the case that the contestants were under the impression that there was no claim urged by the petitioner to a certain part of the land, I think it would be proper to give them an opportunity of establishing their case. Judgment.

(*a*) 3 Cham. R. 50. (*b*) 122. (*c*) 2 Bro. P. C. 63.

1872.

Re Dougherty.

RE DOUGHERTY.

Quieting Titles Act.

A petitioner under the Act for Quieting Titles, and one W. S. were found entitled to the property in question as tenants in common. The Petitioner asked that a certificate issue to himself alone, producing a deed to himself from W. S. conveying the interest of the latter. The consideration in this deed was considerably less than the value of the share of W. S.

The Court in addition to this deed directed an affidavit to be filed, made by the person who had conducted the negotiations for the purchase of the interest of W. S. stating that W. S. was aware that the Court was prepared to issue a certificate to the petitioner and himself as tenants in common; and that he was fully informed as to the value of the property; and further before issuing the certificate the Court required to be satisfied that W. S., with this full knowledge of the facts consented, or did not object, to a certificate issuing to the petitioner.

Statement.

The property in question belonged in 1849 to *Letitia Donohue*, who by her will devised it to her sister *Sarah Stinson*, and then directed that after her decease it should be sold "and the proceeds thereof equally distributed among such of the children and their heirs as are now residing in that part of the kingdom of Great Britain called Ireland. The will bore date the 14th of October, 1869, and the testatrix died on the 16th. *Sarah Stinson* continued to receive the rents and profits of the property during her life, and the petitioner now claimed in as the heir-at-law of her mother (who died in 1869), alleging that she was the only child of *Sarah Stinson* in Ireland at the date of Mrs. *Donohoe's* will.

The evidence produced as to the different members of the family was such as to prove that a son of *Sarah Stinson*, named *William*, now living in Lanark, Scotland, was also in Ireland in October, 1849, and that he and this petitioner's mother were the only members of the family who were so. The petitioner, after seeing the

evidence from Scotland, did not any further dispute *William's* right to an undivided half of the property. Thereupon the necessary advertisement issued, but stating that the petitioner having produced evidence whereby it appeared that he and Mrs. *Stinson* were the owners in fee, persons claiming any title, etc., were required to come in.

Subsequently the title having in other respects been found satisfactory, the petitioner produced a deed from *William*, conveying to the petitioner *William's* undivided half, and desired to have a certificate issued to himself alone.

MR. TAYLOR, REFEREE IN CHAMBERS.—The original petitioner, *James Dougherty*, now asks that the certificate of title may issue in his favor alone. He produces a conveyance from *William Stinson* to himself of *Stinson's* interest in the property in question. Something more is necessary than the mere production of this deed. The petitioner must file an affidavit made by himself or by his solicitor, according as the negotiation for the purchase of *Stinson's* interest, was conducted by the petitioner, or by his solicitor on his behalf.

Judgment.

This affidavit must state that *Stinson* was informed that the Court was satisfied of his being entitled to an undivided half interest in the property and prepared to issue a certificate to the petitioner and himself as tenants in common; also that he was informed of the value of the property, having had all the facts stated to him necessary for his forming an opinion on this subject. This is important, especially in view of the fact that the expressed consideration in the deed from *Stinson* is £75 6*s*. 0*d*., or about $370, while before commencing the present proceedings the petitioner had entered into a contract for selling at the price of $1,700 upon the title being made out; the intending purchaser paying

1872. Re Dougherty. one-half of the expense of quieting the title. The applicant must shew that this fact was communicated to *Stinson*.

If an affidavit apparently satisfactory upon these points be filed, notice must be given to *Stinson*, and a copy of the affidavit served with it. This notice I will prepare. In the event of *Stinson* consenting with full knowledge of the facts, or not objecting to a certificate issuing to the petitioner alone, one may be so issued,

Mr. *George Morphy*, Solicitor for petitioner.

Re Wetenhall.

Costs—Taxation of.

Where an order was applied for, for the taxation of costs incurred in suits in the Court of Common Pleas, the County Court, and Division Court, according to the terms of an alleged agreement as to the rate of remuneration, an order was granted with a direction to the Master to ascertain whether any valid agreement existed between the parties.

[Chambers, 27th June, 1872.]

Statement. Mr. *Foster* moved upon petition for an order for taxation on behalf of a client against his solicitor. The costs were incurred in suits in the Court of Common Pleas, the County Court, and Division Court. He asked that the Master should be directed to tax the bills according to the terms of an alleged agreement as to the rate of remuneration. He cited *Re Phillip* (*a*), to shew that such an order would be made. It was alleged that the solicitor had moneys in his hands belonging to the client.

Mr. *Ewart*, contra, read an affidavit of the solicitor denying the existence of an agreement, except as to the Division Court business. He contended that the application should have been to one of the Courts in which

(*a*) 6 Jur. N S. 1024.

the business was done, and referred to *Re Cameron* (*a*). *Re Prince* (*b*), was distinguishable. In that case there was no bill in any of the Superior Courts. He further contended, that in any event the common order only could be made. He referred to *Re Smith* (*c*), *Alexander* v. *Anderdon* (*d*), *Re Thompson* (*e*), *Re Rhodes* (*f*), *Re Beale* (*g*), *Re Ransom* (*h*), to shew that unless the terms of the alleged agreement were shown to be clear and unambiguous the Court had no jurisdiction, upon petition to make any, but the common order. *Re Phillip* followed *Re Fisher* (*i*), in which the distinction was clearly recognized.

1872.

Re Wetenhall.

THE REFEREE—after looking at the authorities cited, made an order referring the bills for taxation, with a direction to the Master to ascertain whether any valid agreement existed between the parties; and, if so, to have reference to it upon taxation.

Judgment.

IN RE EVANS, LOT 22, SEC. F., MILITARY RESERVE.

Quieting Titles Act—Power of sale in settlement.

Trustees were empowered by settlement "to lay out and invest the whole or any part or parts of the residue and remainder of the fortune of the said *Georgina Huson*, (the settler) so limited in trust as aforesaid in the purchase or purchases of land in fee (free from incumbrances), or such other good security as they shall think fit in England or elsewhere," and a power was given to re-sell lands so purchased, and to invest the proceeds in like manner in other lands or securities,

Held, to give a power to the trustees to sell all lands of the residue of the estate, and not merely lands purchased by the trustees.

A purchaser from the trustees, under the settlement referred to in the judgment, had taken proceedings to

(*a*) 1 Cham. Rep. 356.
(*b*) 3 Cham. Rep. 282.
(*c*) 4 Beav. 309.
(*d*) 6 Beav. 405.
(*e*) 8 Beav. 237.
(*f*) 8 Beav. 224.
(*g*) 11 Beav. 600.
(*h*) 18 Beav. 220.
(*i*) 18 Beav. 183.

1872. quiet his title, a question having arisen as to the
Re Evans. power of the trustees, in the decision of which the infants were interested, the Referee directed the question to be argued before a Judge, and notice to be given to the infants.

Mr. *Kingstone*, for the petitioner.

Mr. *G. Harman*, for the infants and other parties interested.

SPRAGGE, C.—The parcel of land in question is one of several parcels, which the settlor, then Miss *Huson*, had contracted to purchase from the Crown, and upon which a portion of the purchase money remained unpaid. It is clear, from several passages in the marriage settlement, and from its whole tenor, that the term "fortune," used in the settlement, was intended to
Judgment. comprise all the estate, real and personal, of Miss *Huson* which was comprised in the settlement including the parcel in question, and the other parcels purchased from the Crown; and that the words "residue and remainder of the fortune" were intended to apply to all the settled estate beyond the sum of £5000, which was reserved out of the general estate settled, and which the sum of £5000, was to be paid and applied by the trustees for the sole and separate use of Miss *Huson*, and to be at her own disposal, independent of the trusts declared of the residue of the estate.

The trustees have contracted with Mr. *Evans* to sell to him the parcel of land in question, and the question raised is, whether they have power to sell this land. Power is given to the trustees, at any time during the joint lives of the intended husband and wife, or the life of the survivor (they are both still living), "to lay out and invest the whole or any part or parts of the residue and remainder of the fortune of the said *Georgina*

Huson, so limited and settled in trust as aforesaid, in the purchase or purchases of lands in fee (free from incumbrances), or such other good security as they shall think fit, whether in England or elsewhere;" the same to be settled upon the same trusts as had been declared in respect of the residue of the fortune of the intended wife. Then follows a power from time to time to resell lands so to be purchased, or any part or parts thereof; and to invest the proceeds in like manner in other lands or other securities. 1872. Re Evans.

The settlement contains no express power to sell lands except that contained in the clause to which I have last referred, *i. e.*, to resell lands which had been purchased by the trustee under the previous clause; the power, if any is given, must be created by the words, "to lay out and invest the whole or any part or parts of the residue" of the fortune of the intended wife in the purchase of lands or other securities. Judgment.

I think the langage of the settlement, though not formal or explicit, is yet sufficient to give power to the trustees to sell all lands of the residue of the estate, and that the power to sell is not confined to the lands purchased by them. It is a well settled rule that no precise form of words is necessary to the valid creation of powers, though there must be, of course, sufficient words to denote the intention. "Powers," Lord *St. Leonard* says, "are mere declarations of trust, and therefore any words, however informal, which clearly indicate an intention to give or reserve a power are sufficient for the purpose" (*a*); and in another passage the same learned author says, that "the power is equally well created whether words denoting the operation or words describing the effect are used" (*b*); and there is also this principle, which is one of frequent application,

(*a*) Sugden on Powers, 8th ed., p. 102. (*b*) Ib., p. 104.

1872. Re Evans. that when a direction or authority is given generally to do any act such general direction or authority carries with it, by necessary implication, the power to do whatever is necessary in order to the carrying such direction or authority into effect. Among the instances of the application of this principle are *Wareham* v. *Brown* (*a*) *Bateman* v. *Bateman* (*b*), before Lord *Hardwicke*; *Wood* v. *White* (*c*), before Lord *Cottenham*; and *Tait* v. *Lathbury* (*d*), before Lord *Romilly*.

To apply the principles to which I have adverted to the settlement before me. The real and personal estate are treated throughout as forming one fund and the same trusts and powers apply to both. The power to lay out and invest the residue of the fortune settled, is in terms made to apply to the *whole* residue; and the trustees are empowered to invest the whole of it in securities other than lands, and in England, as well as elsewhere, "as they shall think fit." It is manifest that the trustees could not exercise their discretion as they should think fit, but would be fettered in its exercise as to a part of the settled estate, while authority is given to them to exercise it as to the whole, if they have not authority to sell the real property; and there is nothing whatever in the settlement pointing by inference or otherwise to a restriction of their power, and the exercise of their discretion as to the personal estate.

Judgment.

I may say here, that I do not agree with the contention that the lands which were under contract of purchase from the Crown, can be regarded as lands purchased by the trustees because they may have paid the balance of the purchase money. The purchase of these lands had been by Miss *Huson*, and she was equitable owner of them at the date of the settlement. They are in no sense purchased by the trustees.

(*a*) 2 Vern. 153.
(*b*) 1 Atk. 421.
(*c*) L. R. 1 Eq. 174.
(*d*) 4 M. & C. 460.

One other point remains to be noticed. The power to deal with the lands by sale, as I interpret the power, does not arise until there is a residue, and applies only to such residue. The £5,000 excepted from the general trusts of the settlement is required to be first paid and applied to the sole and separate use of the wife. It is suggested on behalf of the infants by Mr. *Harman* that the fact of the £5,000 being so paid and applied by the trustees should be shewn. It should be shewn, because without such payment the trustees are not in a position to sell the land in question. Upon that fact being shewn, the trustees have, in my opinion, power under the settlement to sell the land.

Judgment.

GOOLD v. RICH.

Sale under fi. fa. of goods, of the equity of redemption in portion of mortgaged leaseholds—Purchaser from sheriff taking assignment of mortgage—Right of mortgagor to redeem.

The plaintiff's mortgage comprised leasehold premises held by defendant *R.*, the mortgagor, under two distinct leases. After a decree and final order for sale the Sheriff of the County in which the leaseholds were situate advertised the interest of *R.* in the premises comprised in one of the leases to be sold under a *fi. fa.* against the goods and chattels of *R.* and sold the interest to one *W. W.* afterwards obtained from the plaintiff an assignment of his mortgage and entered into possession of the whole of the mortgaged premises, and received the rents and profits thereof and was subsequently made a party plaintiff in this suit by order of revivor. Upon motion by *R.* for a subsequent account and for reconveyance by *W.* of the whole of the mortgaged premises upon payment of what was found due on taking the account:

Held, that the sale by the sheriff being of the equity of redemption in only a portion of the mortgaged property was invalid and that *R.* was entitled to a reconveyance of the whole premises upon payment of what should be found due to *W.* for what he had paid the sheriff and upon the mortgage.

[January 16th, 1872.

Mr. *C. Moss*, on behalf of the defendant *Rich*, the mortgagor, moved under the circumstances stated in

1872. Goold v. Rich. the head-note and judgment for an order referring it to the Master to take an account of what was due to one *Watts*, who had been added as a party plaintiff by order of revivor, and that upon payment of the amount found due to *Watts* he might be ordered to reconvey the mortgaged premises to *Rich*. He submitted to pay to *Watts* what he had paid the sheriff for the purchase of the interest assumed to be sold to *Watts* at the sale under the *fi. fa.* against *Rich's* goods and chattels; and contended as follows:—

An equity of redemption in leasehold is not saleable under any writ. In *McDonald* v. *Reynolds* (*a*) the present Chancellor, though not deciding the question, expressed a strong view in favor of this contention (see his judgment at page 693.) The power of a sheriff to sell the equity of redemption in any mortgaged property under a writ of execution rests upon statutory provisions, and these provisions have always been strictly construed. Under the Act 12 Victoriæ, cap. 72, which first made the interest of a mortgagor in lands saleable under an execution against lands, it was held that that Act did not apply so as to make the equity of redemption saleable when it was in the hands of an assignee, in a suit against the assignee: *Bank of Upper Canada* v. *Brough* (*b*). So under the same Act it was held that the equity of redemption was not saleable by the sheriff under a writ against lands in a suit against the personal representative of the mortgagor: *Lowell* v. *Bank of Upper Canada* (*c*). To remedy this the statute 27 Victoriæ, cap. 13, was passed. None of the statutory provisions authorizing sales of equities of redemption in either goods or lands refer in terms to equities of redemption in chattels real, and the 360th section of the Common Law Procedure Act under which alone interest or equity of redemption in goods and chattels

Judgment.

(*a*) 14 Grant. 691. (*b*) 2 Er. & App. Rep. U. C. 95.
(*c*) 10 Gr. 57.

by the sheriff is authorized, ought to be construed to refer only to goods and chattels personal. 1872. Goold v. Rich.

Then as the sale was only of a portion of the equity of redemption in the mortgaged premises, the sale was invalid, and no interest passed to the purchaser: *Heward* v. *Wolfenden* (*a*), *Vannorman* v. *McCarty* (*b*). If a sale of a portion of the equity of redemption in chattels was to be allowed, the same inconveniences and absurdities pointed out in these cases as likely to follow in the case of such a sale of the equity of redemption in lands, would result in this case also.

Next, the sale, if it passed any interest, passed only the interest of *Rich* in one of the leasehold properties and he still retains the right of redemption in the other. *Watts* having taken an assignment of the mortgage over the whole, and having entered into possession and receipt of the rents and profits is at any time liable to account as to the portion in which *Rich* still retains an interest, and to reconvey that portion on an apportionment being made of the amount payable under the mortgage. Having accepted an assignment of the mortgage, and allowed himself to be made a party plaintiff in the suit in the order of revivor, *Watts* cannot now be heard to contend that he is not a mortgagee, and that *Rich* is barred of his right to redeem. Statement

Mr. *W. N. Miller*, for *Watts*. It has long been settled law that leaseholds come under the term "goods and chattels;" and section 260 of the Common Law Procedure Act authorizing sales of the equity of redemption in "*any* goods and chattels of the party against whom the writ was issued," which compromises an interest or equity of redemption in leaseholds. He contended that the decision in *McDonald* v. *Reynolds* (*c*) proceeded on the assumption that the property

(*a*) 14 Gr. 188. (*b*) 20 U. C. C. P. 42. (*c*) 14 Grant 693.

1872. had passed—the present point was not in question there; at best it is but a mere dictum, and was not relevant to the question then under consideration, nor does it appear that the Judge's attention was called to the difference in the wording of the two sections as to sales of goods and lands respectively. As to *Watts* not denying his liability to account, he certainly does not admit it, the admission referred to in the evidence is as to a store account *Rich* owed, not as to accounting under the mortgage. As to his being a party and therefore redeemable, he was made a party under an *ex parte* order; it was not his act and he is not bound by it. [THE REFEREE.—But he has allowed the order to stand. It is as if he had allowed a bill of revivor to go *pro confesso* against him. Does this not admit the position?]. The order states his position as a purchaser at the sale, that is what he claims to be; he might admit himself to be a necessary party without admitting the plaintiff's right to redeem. In addition, we contend that *Rich* is precluded by his own act from coming in to redeem: he procured *Watts* to purchase the property—the evidence is in favor of such fact—and *Watts* was influenced by him to bid, and *Rich* is now estopped from setting up any claim to redeem. Had *Rich* told *Watts* that other property was embraced in the sale, *Watts* would not have bid. [THE REFEREE.—To have the benefit of that position you must shew that the fact concealed, or not mentioned, was one that ought to have been communicated.] *Rich* induced *Watts* to buy, and ought to have communicated everything connected with the matter. *Watts* has laid out large sums of money under *Rich's* eyes in improvements, and these ought to be paid for. No assertion of any right to redeem was made until *Rich* was dismissed from *Watts'* employment. These points are only of importance in the event of its being held that an equity of redemption in leaseholds can not

Goold v. Rich.

Judgment.

be sold under a *fi. fa.* against goods: see *Walton* v. *Bernard* (*a*). 1872.

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Mr. *Moss*, in reply. It does not appear by the evidence that *Rich* ever asked *Watts* to become the purchaser for his (*Watt's*) own benefit. This is supported by *Watt's* own testimony. The property is worth $5,000, and the execution was only $1,500. It is therefore very improbable that it was contemplated that *Watts* was to become the purchaser for $1,000, which was all he paid, and to be the absolute owner. This could never have been *Rich's* intention, and he distinctly denies it. The right of *Rich* is to redeem.

Mr. Taylor, Referee in Chambers.—The plaintiff *Huntingdon*, who obtained the final order for sale, never having proceeded with the sale, but having assigned his mortgage to one *Watts*, who took possession under it, the defendant the mortgagor now applies for an order to take a subsequent account, and for the appointment of a new day to redeem. For the purpose of making the motion he had revived the suit, making *Watts* the plaintiff, instead of *Huntingdon*. The order of revivor has been duly served, and is now absolute. The mortgage in question covers two properties, both leaseholds, the one on which a papermill stands being held under a lease from the Grand River Navigation Company, and the other, on which there are erected seven houses, is held under another lease. Judgment.

The plaintiff opposes the application on the ground that he became the purchaser at sheriff's sale under execution against the mortgagor of the mill property, and that as such purchaser he paid off *Huntingdon*, and took an assignment of the mortgage to himself. That such a sale took place under a judgment regularly entered up, and a valid writ issued thereunder is admitted, also that *Watts* became the purchaser.

(*a*) 2 Grant 344.

1872.

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The validity of the sale is, however, attacked upon two grounds; first, that the sheriff could not sell an equity of redemption in leasehold property; and second, that even if he could, the sale is void, because he sold the equity of redemption in a portion of the property only. The present learned Chancellor said, in the case of *McDonald* v. *Reynolds* (*a*), that it is by no means clear that an equity of redemption in leaseholds is saleable at law under execution. Fortunately it is not necessary for me to decide the point, for even assuming it is saleable, it seems to me that the other objection is fatal to the sale in the present case.

It has been held as to leaseholds by the late Chancellor *Vankoughnet*, in *Heward* v. *Wolfenden* (*b*), that the sheriff must sell the equity of redemption in all the mortgaged lands or not at all, and this decision was followed by the present Chancellor, in *McLaren* v. *Fraser* (*c*). A distinction was attempted to be drawn between the wording of the 257th section of the Common Law Procedure Act which relates to the sale of the equity of redemption in real estate, and the wording of the 260th section which relates to sales of a mortgagor's interest in goods and chattels, but I do not think the difference of expression would warrant my holding that the sheriff can sell the equity of redemption in part under the 260th section any more than under the 257th. The reasoning of the learned Chancellor in *Heward* v. *Wolfenden* applies as much to the one case as the other. The argument urged on behalf of *Watts* for giving a different construction to section 260, that, relating as it does, to goods and chattels, a sale of the equity of redemption in a portion of them should be permitted, though not in the other case, because the chattels may be of a perishable nature, one of several lessees under leases covered by a chattel mort-

Judgment.

(*a*) 14 Gr. 693. (*b*) 14 Gr. 190. (*c*) 15 Gr. 239.

gage might die, and thus a sale of the equity of redemption in the others be prevented, while lands are always in existence, has really no force. It is true the lands themselves are always there, but it does not necessarily follow that they are subject to the execution. Indeed, if a mortgagor immediately upon giving a mortgage chooses to convey away his equity of redemption in a portion of the lands, or to execute a second mortgage to a different mortgagee the execution creditor's right to sell the equity of redemption under his writ is gone as effectually as in the case of chattels it would be if part of them had passed out of existence: *Re Keenan* (*a*), *Donovan* v. *Bacon* (*b*). 1872. Goold v. Rich.

There are, however, other grounds upon which the plaintiff seeks to uphold the sale to him, and also other grounds upon which the defendant seeks to establish his right to redeem.

For the plaintiff it is contended that he was induced to purchase at the sheriff's sale by the defendant himself; that the defendant was present at the sale and made no objection; that he accepted after the sale the position of foreman in the mill in question under the plaintiff; and that he permitted the plaintiff to expend large sums of money upon the property, and as foreman, superintended the making of the improvements. On all these grounds it is urged that it would be inequitable to permit the defendant to come in now and redeem. Judgment.

I cannot find in the evidence before me anything to warrant the statement that the plaintiff was induced to purchase by the defendant. The utmost that can be said I think is, the expression of a desire on the part of the defendant that the plaintiff should get the

(*a*) 3 Cham. R. 285. (*b*) 3 Cham. R. 286.

1872. property rather than any one else. The reason for this wish on the part of the defendant, who was quite ignorant of his rights, and that the sale of part of the property alleged to be had was invalid, was that he had been manufacturing paper for the plaintiff, and he hoped to effect some further arrangement by which he should continue to occupy and work the mill, or at all events to be employed by the plaintiff to work it. It should be remarked that the plaintiff was equally ignorant, when he bought, of the invalidity of the sale. The plaintiff in his affidavit says he was induced by the defendant to buy, but on cross-examination he cannot remember any expression made use of by the defendant for that purpose. He says it is his impression now that the defendant desired him to become the purchaser, and he says distinctly that he was not influenced by anything the defendant said.

Goold v. Rich.

Judgment. That the defendant was present at the sale, and did not in any way forbid it, is not denied. Now it is true as a general proposition that if a man having a title to an estate which is offered for sale, and knowing his title, stands by and encourages the sale, or does not forbid it, he will be bound by the sale. But it is indispensable that the party so standing by should be fully apprised of his rights, and should by his conduct encourage the other party to alter his condition, and that the latter should bid on the faith of the encouragement so held out: *Dann* v. *Spurrier* (*a*); and other cases cited in *Kerr* on Frauds, 85. Here the defendant was quite ignorant of his rights, and it is certain he did nothing actively to encourage the plaintiff to buy.

The same remark applies to *Rich's* becoming foreman, and subsequent improvements made by *Watts*. To prove from these circumstances acquiescence in the

(*a*) 7 Ves. 230.

sheriff's sale, it must be shewn that he knew his rights, and of the invalidity of the sale, while the contrary is undoubtedly the fact. A man cannot be bound by acquiescence, unless he is fully apprised as to his rights and all the material facts and circumstances of the case.

When the improvements were made does not appear. If they were made before *Watts* obtained the assignment of the mortgage, and at a time when he had no reason to doubt the validity of the sale, he may have an equity to get them allowed. If made after he became assignee of the mortgage, when he knew the true facts, he can be allowed only such of them as would properly be allowed to a mortgagee in possession.

The sale of certain chattels by *Rich* to *Watts* was an independent transaction. They were not sold by the sheriff, and *Watts* seems to have had some claim on them, or some of them, under a chattel mortgage once held by *Remlin, Gillis & Co.*

Judgment.

The subsequent acts of *Watts* seem to shew that he regarded himself rather as a mortgagee in possession than as owner. He did not pay off the mortgage and have it discharged, he took an assignment of it. Then when the defendant revived the suit he did not move against the order, but allowed it to become absolute.

Then as to the not refusing to give an account, or not denying *Rich's* right to one when it was applied for, but only putting off giving it by saying his books were not posted up, and so on. There were dealings between the two before the sheriff's sale, and *Watts* swears positively that when the account was applied for he understood *Rich* to refer to that account and to an open store account between them.

1872.

Goold v. Rich.

On the whole, I think *Watts* is liable to be redeemed. The account will be taken of what is due to *Watts* including what he has paid the Bank of Montreal, (this is assented to by *Rich*), and he should also be allowed for all improvements before he obtained the assignment of the mortgage from *Huntingdon* and any improvements proper to be allowed to a mortgage since.

Judgment.

A DIGEST

OF

ALL THE REPORTED CASES

DECIDED IN

CHANCERY CHAMBERS AND THE MASTER'S OFFICE

DURING THE YEAR 1872.

AFFIDAVIT.

Of justification.]—*See* SECURITY FOR COSTS.

Of execution.]—*See* SECURITY FOR COSTS.

Of proof of title.]—*See* QUIETING TITLES ACT, 2.

AGENCY.

Lien of solicitor for agency bill.]—*See* LIEN.

AMENDMENT.

Of decree.]—*See* DECREE.

APPEAL.

From Referee of Titles.] — *See* QUIETING TITLES ACT.

APPROPRIATION OF PAYMENTS.

See USURY.

BAR OF ESTATE TAIL.

See ESTATE TAIL.

BILL.

Dismissal of.]—*See* DISMISSAL OF BILL.

BOND.

For security for costs.]—*See* SECURITY FOR COSTS.

CHAMBERS.

Court motion taken in.] — *See* MOTION.

CONCEALMENT.

See SUPPRESSION OF MATERIAL FACTS.

COSTS.

Taxation of.]—Where an order was applied for, for the taxation of costs incurred in suits in the Court of Common Pleas, the County Court and Division Court, according to the terms of an alleged agreement as to the rate of remuneration, an order was granted with a direction to the Master to ascertain whether any valid agreement existed between the parties. *Re Wentenhall*, 82.

Security for.]—*See* SECURITY FOR COSTS.

Of appeal.]—*See* QUIETING TITLES ACT, 4.

Set off of.]—*See* DISMISSAL OF BILL.

Appeal under Quieting Titles Act.]—*See* QUIETING TITLES ACT, 4.

Of the day.]—*See* WARRANT.

COURT.

Motion made in Chambers.]—*See* MOTION.

DECREE.

Amending decree—Referee's jurisdiction—Leave to hear.]—The Referee's jurisdiction with regard to amending decrees considered. Lapp *v.* Lapp, *ante* p. 234, affirmed. Leave to rehear refused, after considerable delay on part of party seeking to rehear, and where the grounds for rehearing was an alleged error in the decree which was not an obvious error and caused no miscarriage of justice. *Lapp* v. *Lapp*, 3.

DEED.

See VENDOR AND PURCHASER.

DEVISE.

Of trust estate.]—*See* VENDOR AND PURCHASER.

DISMISSAL OF BILL.

Set off of costs.]—A bill had been filed for an injunction to stay an action of ejectment, which action the plaintiff having successfully defended before any injunction could be obtained, he proceeded no further with his suit in equity. Upon the application of the defendant the bill was dismissed with costs.

It was claimed that the costs at law should be set off as against these costs, but the Referee considered that the rule in England should be followed here, viz.: that costs at law could not be set off against costs in equity.

STRONG, V.C., affirmed the order of the Referee as to the dismissal of the bill with costs, and, without expressing any opinion as to whether costs at law could be set off against costs in equity in a proper case, affirmed the order of the Referee on this point also, on the ground that in this case the lien of the attorney-at-law attached, and was paramount to any right set off. *Webb* v. *McArthur*, 63.

DOCUMENTS.

Production of.]—*See* PRODUCTION OF DOCUMENTS.

EQUITY OF REDEMPTION.

Sale of portion of.]—*See* SALE, 1.

ESCHEAT.

Of trust estate.]—*See* TRUST ESTATE.

ESTATE TAIL.

Quieting Titles Act.]—Whether a mortgage in the short form, under the statute 27 and 28 Vic. ch. 31, executed by the tenant in tail, has the effect of barring the entail.—*Quære. Re Dolsen*, 36.

EXAMINATION.

Compelling attendance of a party out of jurisdiction for the purpose of being examined.]—A plaintiff, desirous of obtaining the evidence of a defendant who resided out of the jurisdiction and could not be served personally, paid a sufficient sum to the defendant's solicitor for conduct money, and moved for substitutional service of a subpœna on the solicitor, and that if default was made in attending, the bill might be taken *pro confesso*. The application was refused with costs. *Sefton* v. *Landy*, 33.

EXECUTIONS.

Certificate of.] — *See* QUIETING TITLES ACT, 2.

INTEREST.

See USURY.

IRREGULARITY.

A notice of motion to set aside any order or proceeding for irregularity must state the grounds of irregularity on which the applicant relies. *Donelly* v. *Jones*, 48.

JURISDICTION.

Of Referee to amend decree.]—*See* DECREE.

Examination of party out of.]—*See* EXAMINATION.

LEGACY.

Where amount very small.]—Where no letters of administration had been taken out, and a legatee was entitled to a very small sum, an order was made for payment out of the amount to the solicitors of the legatee without letters of administration, he undertaking to apply it as intended. *Ross* v. *Ross*, 27.

LIEN.

Solicitor and agent.—Lien.]—The agent of a solicitor has a lien on the papers, or on a fund recovered against his principal, and to the same extent against the principal's client, and such client is justified in paying the agent so as to discharge such lien and obtain his papers.

Where the client had paid the Toronto agent who retained the bulk of the funds recovered on account of his agency bill, and offered the principal the balance, who refused it, and issued execution against the client for the whole amount, such execution was stayed with costs.

The agency charges in the following case were wholly for work in the suit in which the client was a party, *sed query*, would the solicitor's lien attach for the amount of his agency bill generally. *Re Cross*, 11.

MASTER.

Directions of, not followed in sale.] *See* SALE, 2.

See WARRANT.

MORTGAGE.

See ESTATE TAIL.

Usurious.]—*See* USURY.

Sale of part of equity of redemption.]—*See* SALE, 1.

MOTION.

Chambers or Court Application.] —A motion which is strictly and properly a Court motion, will not be taken in Chambers by the consent of parties.

A motion so made in Chambers was refused, but without costs. *Thompson* v. *Freeman*, 1.

POWER OF SALE.

In settlement.]—*See* TRUSTEES.

PRODUCTION OF DOCUMENTS.

A party is not obliged to produce deeds or documents which relate to his own title, and do not tend to establish the case of the party calling for the production. *Stovel* v. *Coles*, 9.

SETTLEMENT.

Power of sale in.] —*See* TRUSTEES.

QUIETING TITLES ACT.

1. *Quieting Titles Act.*] — The Court, or a Judge thereof, is empowered, by the 21st section of the Quieting Titles Act, to refer a disputed question to an expert, and considering him as an assessor assisting the Court with his judgment, will act on his finding, unless it is clearly established that the finding is erroneous.

On an appeal from a report of the accountant, when Referee of Titles, the Judge who heard the appeal directed that it be referred to a surveyor, to enquire and report whether the description in a certain conveyance did, or did not, include the land in dispute. The Referee had found that it did, and the surveyor's report confirmed the Referee's finding. The Judge thereupon adopted the surveyor's report, and dismissed the appeal with costs. *Re Howland*, 58.

2. *Quieting Titles Act.*]—In proceeding under the Quieting Titles Act, although it is not imperative that the affidavit in proof of title should be made by the petitioner, some valid reasons should be given why it is not so made when such is the case.

Where the title had passed through the hands of a trustee to pay creditors, notice was required to be given to the trustee, and an advertisement was directed to be published, calling on the creditors to shew cause why a certificate should not issue.

It is necessary that a certificate from the sheriff as to executions against the petitioner, be produced. *Re Rundel*, 71.

3. *Quieting Titles Act.*] —A petitioner under the Act for Quieting Titles, and one W. S. were found entitled to the property in question as tenants is common. The petitioner asked that a certificate issue to himself alone, producing a deed to himself from W.S. conveying the interest of the latter. The consideration in this deed was considerably less than the value of the share of W. S. The Court, in addition to this deed, directed an affidavit to be filed, made by the person who had conducted the negotiations for the purchase of the interest of W. S., stating that W. S. was aware that the Court was prepared to issue a certificate to the petitioner and himself as tenants in common; and that

he was fully informed as to the value of the property; and further, before issuing the certificate the Court required to be satisfied that W. S., with this full knowledge of the facts, consented, or did not object, to a certificate issuing to the petitioner. *Re Dougherty*, 80.

4. *Quieting Titles Act (29 Vic. c. 25)—Security for costs—Married woman—Next friend.*]—The Referee having found against two parties, a husband and wife, who had each been contestants in an investigation under the Quieting Titles Act, they appealed, and the appeal was dismissed with costs. They afterwards applied under sec. 42 of the Act, to have a re-investigation of the title. Upon an application by the original petitioner, proceedings were stayed until the costs of the appeal were paid, and security given for costs of the present proceedings; and until a next friend was appointed for the married woman contestant.

The Court will, in the interests of justice, exercise a liberal discretion in extending the time for appealing, or reinvestigating a title, where any error is alleged to exist. Where, therefore, it appeared that the contestants had been somewhat misled as to a separate piece of land to which they supposed no claim to be asserted, the Court granted an application for a reinvestigation of the title after the time for applying had expired, on payment of costs. *Re Howland*, 74.

See SUPPRESSION OF MATERIAL FACTS.

REFEREE.

Jurisdiction of, to amend decree.]—*See* DECREE.

REFERENCE.

Changing reference.]—A plaintiff is entitled *prima facie* to have the reference to the Master who resides in the county in which the bill is filed; but this *prima facie* right may be rebutted by shewing sufficient grounds for the Court directing the reference to the Master at some other place.

Where an application of this kind is rested on the ground of expense, the difference in expense must in general be considerable; and where the application is rested on the ground of convenience, a slight or doubtful balance of convenience is not sufficient to deprive the plaintiff of his *prima facie* right; a reasonably clear case of preponderating convenience must be established by the defendant.

A man in extensive business, or a trustee, is not entitled, when a defendant, to have the reference to such place as suits them best, if there is no other strong ground for the change from the place selected by the plaintiff. *McNab* v. *McInnis*, 53.

RE-HEARING.

See DECREE.

RE-SALE.

See STAYING SALE.

REVIVOR.

See SEQUESTRATION.

SALE.

1. *Sale under fi. fa. goods of the equity of redemption in portion of mortgaged leaseholds—Purchaser from sheriff taking assignment of mortgage—Right of mortgagor to redeem.*]—

The plaintiff's mortgage comprised leasehold premises held by defendant *R.*, the mortgagor, under two distinct leases. After a decree and final order for sale the sheriff of the county in which the leaseholds were situate advertised the interest of *R.* in the premises comprised in one of the leases to be sold under a *fi. fa.* against the goods and chattels of *R.* and sold the interest to one *W. W.* afterwards obtained from the plaintiff an assignment of his mortgage and entered into possession of the whole of the mortgaged premises, and received the rents and profits thereof, and was subsequently made a party plaintiff in the suit by order of revivor. Upon motion by R. for a subsequent account and for reconveyance by *W.* of the whole of the mortgaged premises upon payment of what was found due on taking the account:

Held, that the sale by the sheriff being of the equity of redemption in only a portion of the mortgaged property was invalid and that *R.* was entitled to a reconveyance of the whole premises upon payment of what should be found due to *W.* for what he had paid the sheriff, and upon the mortgage. *Gould* v. *Rich*, 87.

2. *Sale—Master's directions not followed.*]—When a sale has been held and the Master's directions have not been followed, the vendor will have to shew, at his own expense, that no person interested had been injured by the non-observance of the directions; otherwise the Master will not confirm the sale. *Royal Canadian Bank* v. *Dennes*, 68.

SECURITY FOR COSTS.

Security for costs, bonds for, notice of motion for irregularity—Affidavit of justification.]—It is no objection to a bond for security of costs that there is no affidavit of execution annexed.

Neither is any affidavit of justification necessary until the solvency of the surety is questioned.

In the case of bonds for carrying a case to the Court of Appeal, an affidavit of justification is necessary under the order of Court of Error and Appeal, No. 8.

A bond for security for costs need not be by two sureties unless the defendant, before the bond is prepared, gives notice that he requires two sureties. *Donnely* v. *Jones*, 48.

SEQUESTRATION.

Setting aside sequestration.]—A writ of sequestration had been taken out in a cause in which an order to revive had issued against the parties who would have represented the estate of a supposed intestate, had he been such; but a will had been subsequently found, and the revivor, it was contended was irregular.

A motion to set aside the writ of sequestration on this ground, and on the grounds that the defendant had proved under the decree in the suit said to be thus irregularly revived, and that there were prior creditors to him, was refused with costs.

Semble,—The proper course, under such circumstances, would be to move against the order of revivor. *Meyers* v. *Meyers*, 41.

SET-OFF.

Of costs at law against costs in equity.]—*See* DISMISSAL OF BILL.

SOLICITOR.

Lien of, for agency account against principal and principal's client.]—*See* LIEN.

STATUTES, CONSTRUCTION OF.

27 & 28 Vic. ch. 31.] – *See* ESTATE TAIL.

29 Vic. ch. 25.]—*See* QUIETING TITLES ACT.

STAYING SALE.

Staying sale, purchaser—Forfeiture.]—Although the Court is averse to interfering with sales under decrees or orders of the Court, yet, where a sufficient case is made, it will nevertheless grant indulgence to a purchaser in aid of carrying out a sale previously made, and when a re-sale is about to take place.

Where a re-sale had been advertised and was about to take place, the purchaser who was a devisee and had reason to expect to receive a balance from the estate, in which he was disappointed, and had been unable to carry out his purchase sooner, applied for a stay of the re-sale, he was let in to complete his purchase on payment of costs, and of the purchase money, into Court with subsequent interest, and of $100 to cover his share of costs of second sale, and of the application. *Denison* v. *Denison*, 37.

SUPPRESSION OF MATERIAL FACTS.

Ex parte order.]—An application for leave to pay into Court $400, as security for costs of an appeal from a certificate of title under the Quieting Titles Act having been granted by the Referee *ex parte*, and it not having been brought to his notice that the appeal was as to two separate parcels of land, one claimed by a husband and wife, and the other by the husband alone; it was held that the order was bad, as these facts should have been made known to the Referee, and the order under such circumstances made upon notice. *Re Howland*, 6.

SURETIES.

See SECURITY FOR COSTS.

TAXATION.

See COSTS.

TITLE.

See QUIETING TITLES ACT—PRODUCTION OF DOCUMENTS.

TITLE DEEDS.

See VENDOR AND PURCHASER.

TRUST ESTATE.

Quieting Titles Act—Notice—Evidence, &c.—Trust estate.]—Whether trust estates, escheat, &c., considered. *Re Adams*, 29.

Devise of.]—*See* VENDOR AND PURCHASER.

TRUSTEES.

Quieting Titles Act—Power of sale in settlement.]—Trustees were empowered by settlement "to lay out and invest the whole or any part or parts of the residue and remainder of the fortune of the said Georgina Huson (the settler) so limited in

trust as aforesaid in the purchase or purchases of land in fee (free from incumbrances), or such other good security as they shall think fit in England or elsewhere," and a power was given to re-sell lands so purchased, and to invest the proceeds in like manner in other lands or securities.

Held, to give a power to the trustees to sell all lands of the residue of the estate, and not merely lands purchased by the trustees. *In re Evans, Lot 22, sec. F, Military Reserve*, 83.

USURY.

Usury — Appropriation of payments.]—A mortgage securing ten per cent. made after the Statute 16 Vic. ch. 80, and before 22 Vic ch. 86, cannot be enforced for more than six per cent., though as to payments made without appropriation the mortgagee may appropriate the money to the satisfaction of the usurious interest before coming into Court.

In part payment of the usurious mortgage, another mortgage of a third party had been assigned, which had not fallen due.

Held, that the amount of the mortgage could not be applied by anticipation to the payment of usurious interest not due. *Fuller* v. *Parnall*, 70.

VENDOR AND PURCHASER.

Title deeds—Crown bonds—Devise of trust estate, &c.]—A vendor is bound, at his own expense, to furnish a purchaser with copies of all instruments relating to the title which are not of record.

A purchaser is entitled to copies of title deeds registered by memorials, but not of deeds registered under the Registry Act of 1867.

Where a testator held certain lands as a trustee, to secure a debt due him, and devised the residue of his property to his executors, except such parts thereof as might at his decease be vested in him upon any trusts or by way of mortgage, and then, by a subsequent devise, all the residue of his estate, real and personal, to J. M. (whom he also appointed one of his executors), and his heirs absolutely:

Held, that under the second devise the legal estate in the property held in trust passed to J. M.

Held, also, that J. M. and the executors could by their deed pass all the legal and equitable interest in the trust estate sold.

The testator, under the above circumstance, had joined in certain Crown bonds, which remained undischarged: *Held*, that they formed a charge upon the lands, which the purchaser was entitled to have removed. *Re Charles*, 19.

WARRANT.

Proceedings on Master's warrant—Costs of day.]—The Master will proceed upon his warrant, though the order of reference be obtained *ex parte* and be not served, so long as the warrant is not moved against.

As to when costs of day will be granted. *Re McDonnell*, 69.

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